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Filed December 20, 1950

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Petitioner, NIAGARA MOHAWK POWER CORPORATION, a corporation, is successor Licensee in the proceeding before the Federal Power Commission under the Federal Power Act formerly entitled, "In the Matter of The Niagara Falls Power Company, Project No. 16". Petitioner being aggrieved by the Order of the Federal Power Commission (the "Commission") in the said proceeding issued on September 27, 1950 and by certain Findings and Conclusions incorporated in and forming a part of Opinion No. 200 accompanying the said Order, does hereby, pursuant to Section 313(b) of the Federal Power Act (49 Stat. 860; 16 U.S.C. 825 l, (b)), pray that the said Order be set aside in part and modified and that the findings and conclusions of the Federal Power Commission contained in said Opinion No. 200 be set aside in part and modified, all as here-

inafter more fully alleged and set forth; and Petitioner respectfully shows, upon information and belief:

THE NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Niagara Mohawk Power Corporation, the Petitioner in this proceeding, is a corporation organized and existing under the laws of the State of New York and authorized thereunder to engage in the business of generating, transmitting and distributing electric energy to the public in the State of New York, including the operation of the hydroelectric plants at Niagara Falls which are designated as Project No. 16. In its conduct of its said business, including the operation of Project No. 16, the Petitioner is and will be subject to the jurisdiction of the Public Service Commission of the State of New York pursuant to the Public Service Law of the State of New York (N. Y. Cons. Laws, c. 48). The Petitioner has its principal office in the City of Syracuse, New York.

2. The Niagara Falls Power Company was a corporation organized and existing under the laws of the State of New York and authorized thereunder to engage in the generation of hydromechanical and hydroelectric power and energy and the transmission and distribution of electric power and energy, and to divert a portion of the waters of the Niagara River for such power purposes.

The Niagara Falls Power Company (herein sometimes referred to as "the Power Company") was the successor by consolidation under Chapters 596 and 597 of New York Laws of 1918 to three constituent companies respectively named The Niagara Falls Power Company (organized under Chapter 83 of New York Laws of 1886 as amended, and herein referred to as "Niagara Constituent"), Hydraulic Power Company of Niagara Falls (herein referred to as "Hydraulic") and Cliff Electrical Distributing Company. Hydraulic in turn was successor by merger to The Niagara Falls Hydraulic Power and Manu-

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facturing Company, a corporation organized in 1878 under Chapter 611 of New York Laws of 1875,* herein referred to as "Manufacturing."

The Niagara Falls Power Company was licensee under a license issued under the Federal Water Power Act of 1920 (41 Stat. 1063), designated as the "License, Project No. 16", issued on March 2, 1921. Said license when issued covered the then-existing constructed plants of the Power Company and plants, then under construction, which were thereafter completed and have been operated by the Power Company until the date of merger hereinafter referred to, and thereafter by the Petitioner.

The Project No. 16 License has subsequently been from time to time amended under the Federal Water Power Act of 1920 and Federal Power Act (49 Stat. 838, 16 U.S.C. 791-823); and as so amended and subsisting at the respective times to which references are hereinafter made, is herein referred to as the "License."

3. By merger under Section 85 of the Stock Corporation Law of the State of New York (N. Y. Cons. Laws, c. 59) effected October 19, 1950, Petitioner, Niagara Mohawk Power Corporation, has become vested with all the properties and assets of the Power Company, and pursuant to authorization of an Order Approving Transfer of License made by the Federal Power Commission, dated September 25, 1950 and issued September 27, 1950, has become successor to the Power Company as Licensee under the Project No. 16 License.

The term "Licensee" as used in this petition relates to The Niagara Falls Power Company for all times prior to October 19, 1950 and to Niagara Mohawk Power Corporation for all times subsequent to said date.

4. The proceeding in which the order of the Commission here presented for review was made was brought by the Commission under Section 10 (d) of the Federal Power Act (49 Stat. 842; 16 U. S. C. 803(d)). Said

* A general statute for the incorporation of business corporations.

statute, which is printed as Exhibit A to this petition, provides in effect for the establishment by a licensee of amortization reserves, after the first 20 years of operation under a license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of the licensee in the licensed project. Section 10 (d) provides that such reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. The "specified rate of return" under the Project No. 16 License as amended is 6%, and the License provides that one-half of any such surplus earnings shall be paid into and held in such amortization reserve.

In the event of recapture of the licensed Project at the expiration of the License, the amortization reserve may, under provisions of Sections 14 and 3(13) of the Federal Power Act (16 U. S. C. 807 and 796 (13)), be deducted from original cost of the Project in determining the amount to be paid to the Licensee upon recapture.

5. The proceeding before the Commission was initiated by an Order To Show Cause dated March 16, 1948 and was heard pursuant to an Order dated March 15, 1949, which incorporated by reference a Revised Staff Report dated February 23, 1949, covering the operations of Licensee from March 2, 1921 to December 31, 1946. Licensee served its answer to the Order of March 15, 1949 and Revised Report on April 14, 1949.

After hearings, decision by the Presiding Examiner and exceptions thereto, and oral argument before the Commission, the Commission on September 27, 1950 issued its Opinion No. 200 and Order directing, among other things, that the Licensee shall credit to its Account 258.1, Amortization Reserve—Federal, the amount of $914,432.04 as representing one-half of its surplus earnings from normal operations of Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive.

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Petitioner filed its Petition for Rehearing on October 23, 1950, which was denied by the Commission by Order Denying Petition for Rehearing dated and issued October 30, 1950.

6. Petitioner's application to this Court for review of the Commission's Order of September 27, 1950 in this proceeding is directed to two findings and conclusions of the Commission which, by affecting the elements of computation of amortization reserve liability for the period which was the subject of the Commission's proceeding, have resulted in an erroneous increase in the amount of amortization reserve to be set aside for the period, from $515,432.04 to $914,432.04 (as prescribed by Commission's Order). The difference in amount of $399,000 results (1) from an adjustment increasing project revenues of the Licensee for the periods in question by the amount of $37,800 annually (although such amounts were not received by the Licensee), and (2) by the disallowance from operating expenses of the Licensee of $99,000 annually paid to the International Paper Company, a nonaffiliated industrial corporation, pursuant to contract for the use of certain water rights previously owned and utilized by International Paper Company and conveyed by it to the Licensee by defeasible grant conditioned upon such annual payment.

Petitioner's allegations of error with respect to the said Order of the Commission, the said determinations with respect to project revenues and operating expenses, and the Findings and Conclusions of the Commission underlying such determinations, are hereinafter more fully set forth.

The Facts and Statutes Upon Which Jurisdiction is Based

7. The Order of whch review is sought, and the accompanying Opinion No. 200, were issued September 27, 1950, purportedly under the provisions of the Federal Power

Act (41 Stat. 1063 *et seq.*, as amended 49 Stat. 838 *et seq.*; 16 U. S. C. 791 *et seq.*), and particularly under the provisions of Section 10 (d) of said Act (16 U. S. C. 803 (d)).

8. The provisions for review of orders of the Federal Power Commission are contained in Sections 313(a) and (b) of the Federal Power Act (49 Stat. 860; 16 U. S. C. 825 l, (a), (b)). Section 313(a) provides, as a prerequisite to judicial review, the filing of an application for rehearing with the Commission within 30 days after the issuance of the order. The Petitioner filed its application for rehearing on October 23, 1950 within the time provided by the Act.

9. Section 313(b) of the Federal Power Act provides for judicial review of orders of the Federal Power Commission by petition for review to the Circuit Court of Appeals of the United States for the circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, such petition to be filed in such Court within sixty days after the order of the Commission upon the application for rehearing; in this case, on or before December 29, 1950.

THE RELIEF PRAYED

10. The Petitioner prays:

A. That the said Order of the Federal Power Commission contained in Opinion No. 200 of said Commission, dated September 25, 1950 and issued September 27, 1950, be reviewed by this Honorable Court;

B. That the said Order, and particularly Clause (B) thereof and the determination in said Clause (B) of the amount to be credited to Account 258.1, Amortization Reserve—Federal, in the amount of $914,432.04, be set aside in part and modified, so that said Order as modified shall provide that the amount to be cred-

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ited to said Account 258.1 under the said Clause (B) of said Order shall be $515,432.04;

C. That the Findings and Conclusions contained in the said Opinion No. 200 and numbered 6, 7, 8, 9 and 10 under the heading *"Amortization Reserve Proceeding"* therein, be modified in conformity with the facts of record and the correct principles of law applicable thereto;

D. That the Finding numbered 4 set forth in the Findings and Conclusions of the said Opinion No. 200 under the heading *"Amortization Reserve Proceeding"* be modified so as to reflect, in the columns entitled "Earnings", "Specified Return (6%)", "Surplus Earnings" and "Amortization Reserve Credits", the application of correct figures for project revenues and operating expenses in accordance with the accounts of the Licensee for the applicable period, without increase by the amount of $37,800 annually ($31,500 for the period 3/2/1941 to 12/31/1941) of project revenues (as was determined by the Commission) and without deduction of $99,000 annually ($82,500 for the period 3/2/1941 to 12/31/1941) from operating expenses of the Licensee for the applicable period, so that said Finding 4 as modified shall read and provide as set forth in Exhibit B annexed to this Petition;

E. That the Finding and Conclusion numbered 5 in said Opinion No. 200 under the heading *"Amortization Reserve Proceeding"* therein, be modified in conformity with the said Order to provide that the amount of credit to the amortization reserve account referred to therein shall be $515,432.04 (instead of $914,432.04 as therein stated);

F. That the Findings and Conclusions numbered 6, 7 and 8 of said Opinion No. 200 be modified so as to find and conclude that the water rights (hereinafter described and referred to as the "Pettebone-Cataract Water Rights"), underlying the Deed and Agreement

of May 1, 1925 made by and between Niagara Lockport and Ontario Power Company and The Niagara Falls Power Company, are valid rights of property under the laws of the State of New York and of the United States, and are entitled to recognition by the Commission in its administration of the Federal Power Act, and that the said Deed and Agreement dated May 1, 1925, as amended, was at all times hereinafter mentioned a valid and subsisting agreement binding upon and enforceable against the Licensee according to its terms;

G. That the Findings and Conclusions numbered 9 and 10 of said Opinion No. 200 be modified so as to find and conclude that the rights to divert and use for power purposes approximately 730 cubic feet per second ("cfs") of water of the Niagara River which were possessed and utilized by International Paper Company under grant and conveyance prior to July 1, 1919 were valid rights of property under the laws of the State of New York and the United States and are entitled to recognition by the Commission in its administration of the Federal Power Act; that the Agreement dated March 1, 1919 between International Paper Company and The Niagara Falls Power Company, granting and conveying the said rights of diversion subject to defeasance upon condition subsequent, and said Agreement as the same was amended by Agreement dated August 1, 1937, was and continues to be a lawful and valid agreement enforceable for the benefit of International Paper Company and binding upon the Licensee in accordance with its terms;

H. That this Honorable Court shall grant to your Petitioner such other and further relief as may be just and proper in the premises.

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Summary of the Facts With Respect to the Issues Here Presented

Adjustments of Project Revenues—
The "Pettebone-Cataract Rights"

11. The rights here in controversy with respect to the adjustments of project revenues made by the Commission are rights to divert 262.6 cfs of water from the Hydraulic Canal of the Licensee at the Canal Basin adjacent to its Schoellkopf Station, and to use this water for the generation of power at a head of 100 feet, such water to be discharged upon the lands of the Licensee below the High Bank of the Niagara River and to be subject to reuse by the Licensee through the remaining available fall for the development of power.

The said rights were created in and prior to 1879 by a predecessor in title of Manufacturing Company prior to the commencement of operation of the Hydraulic Canal by the latter company, having been conveyed at that time as specified water power rights appurtenant to mill sites adjacent to the Hydraulic Canal basin. These mill sites and appurtenant water rights were thereafter acquired by Pettebone-Cataract Paper Company and Cataract City Milling Company, and were the subject of an agreement, specifying and defining rights of the said companies and of Manufacturing Company as owners of the Hydraulic Canal, entered into between the said companies in the year 1900. Said water rights were utilized by the said Pettebone-Cataract and Cataract City companies for many years prior to 1925; and in the years 1917 to 1923 were the subject of a litigation in the Supreme Court of the State of New York between Hydraulic Company (and the Licensee as its successor) as plaintiff, and Pettebone-Cataract Paper Company and Cataract City Milling Company as defendants, involving among other things the title to and use of the said water rights. (*Hydraulic Power Company of Niagara Falls* v. *Pettebone-Cataract Paper Co.*, 112 (N. Y.) Misc. 528, 183 N. Y. Supp. 373 (1920);

198 App. Div. 644, 191 N. Y. Supp. 12 (1921).) In this litigation the defendants were held to be the owners of the water rights (198 App. Div. 646), while the plaintiff Licensee was held to be entitled to an injunction enforcing its rights to enter upon defendants' premises to construct its facilities to use the water through the remaining available fall, and to damages for preventing the exercise of such rights. In the said litigation the Licensee, at a date in 1923 subsequent to the issuance of the Project No. 16 License, recovered a money judgment against the Pettebone-Cataract and Cataract City companies in an amount of approximately $172,000.

In 1925, Niagara, Lockport and Ontario Power Company ("Niagara Lockport") accepted an offer of the Pettebone-Cataract and Cataract City companies for the purchase from said companies of all their lands, water rights, buildings, plant, machinery and equipment at the Hydraulic Basin at Niagara Falls (including the right to divert and use 262.6 cfs of water at 100 feet of head), to be paid by the delivery of $700,000 of 7% preferred stock of Niagara Lockport and by the assumption or discharge of said judgment. Thereafter, the Licensee offered to purchase from Niagara Lockport the lands, buildings, plant, machinery and equipment in consideration of satisfaction of the said judgments; and further offered to lease from Niagara Lockport the water rights, and in consideration therefor to supply 2000 kw of alternating current electric energy as the equivalent of the said water, upon payment by Niagara Lockport of a charge to cover the costs of generation and transmission and of a further annual rental charge, deriving from the original grant thereof, of $2400 for the taking and use of 34.8 cfs of said water from the Canal Basin owned by the Licensee. The said transactions, of purchase by Niagara Lockport from the Pettebone-Cataract and Cataract City companies of the said lands, water rights, buildings, plant, machinery and equipment, subject to the judgment, for a consideration of $725,000, and of transfer by Niagara Lockport to the Power Company of all

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the said property other than the water rights, and of leasing of the latter (262.6 cfs of water at 100 feet of head) to the Power Company, were all approved by an order of the Public Service Commission of the State of New York made in its Case No. 2427 dated March 12, 1925.

The conveyance of said properties (other than water rights) and the lease of said water rights, subject to certain specified reservations, and the agreement of the Licensee to supply to Niagara Lockport 2000 kw of electric power, were embodied in a Deed and Agreement executed by Niagara Lockport and the Power Company under date of May 1, 1925. Since 1925 the Licensee has utilized the water which had theretofore been subject to the rights of the Pettebone-Cataract and Cataract City companies in its Schoellkopf Station for the generation of hydroelectric power under a head of approximately 215 feet, and has duly performed all the terms and provisions of the said Deed and Agreement dated May 1, 1925, as amended, on its part to be performed, including the supply of power to Niagara Lockport, and to Buffalo Niagara Electric Corporation as its successor by consolidation, at the rate of payment and subject to the terms and conditions provided in the said Deed and Agreement as amended.

In 1947 the Public Service Commission of the State of New York (by Order dated February 5, 1947 in Case 12727) and the Securities and Exchange Commission (by Order dated February 28, 1947 in the proceeding designated File No. 70-1456—HCA Release No. 7246) consented to a proposed transfer of the said water rights from Buffalo Niagara Electric Corporation to the Licensee for a consideration of $728,415.48.

Disallowances of Operating Expenses—
The International Paper Company Rights

12. Prior to 1896 Niagara Constituent had constructed an intake canal, hydroelectric plant and discharge tunnel for diverting from the Niagara River above the Falls water for the generation of electric power, in accordance with au-

thorization of statutes of the State of New York.* By an Agreement of Lease dated September 1, 1891, a Deed of March 7, 1896 and Lease dated March 7, 1896, and an Agreement dated June 1, 1898, International Paper Company became the owner of a parcel of land adjacent to the Niagara River and to the intake canal of Niagara Constituent and of rights in perpetuity to divert therefrom and use for power purposes an amount of water sufficient to develop 8156.2 horsepower, amounting to approximately 730 cfs of water. These water rights were the subject of litigation in the case of *International Paper Company* v. *United States*, 68 Ct. Cls. 414, reversed 282 U. S. 399, in which the right of International Paper Company to draw water from the intake canal of Niagara Constituent was characterized by the Supreme Court of the United States as "a corporeal hereditament and real estate".

Under date of March 1, 1919 The Niagara Falls Power Company and International Paper Company entered into an Agreement whereby the Power Company granted to the Paper Company a right by way of lease and easement in gross in and to its lands, water rights, works and machinery for supplying to the Paper Company firm power in the amount of 8750 electrical horsepower, and International Paper Company conditionally granted and released to the Power Company all of its rights under the prior deeds and agreements to draw from the Power Company's intake canal, water for use in the development of power, subject to the condition, however, that if the Power Company should fail for a period of 90 days to deliver the firm power specified in the Agreement, then at the option of International Paper Company, evidenced by written notice, all original rights of the Paper Company under the Deed of March 7, 1896, the Lease of March 7, 1896 and Agreement of June 1, 1898 should revive and continue in full force and effect to the same extent as if the conditional grant of March 1, 1919 had not been made.

* New York Laws as follows: L. 1886, c. 83; L. 1886, c. 489; L. 1889, c. 109; L. 1891, c. 253; L. 1892, c. 513; L. 1893, c. 477.

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By an Agreement between the Licensee and International Paper Company dated August 1, 1937, the Agreement of March 1, 1919 was amended by providing that the Paper Company would thereafter pay for electrical energy at rates prescribed by the filed tariffs of the Licensee from time to time in effect, and that the Licensee would pay to the Paper Company the fair and reasonable annual use or rental value for the water conditionally conveyed and released by the Paper Company, to be determined by a formula provided in the Agreement. The defeasance clauses of the 1919 Agreement were amended to provide in effect that if the Licensee should at any time cease its diversion for power purposes, or cease to pay the rental required under the Agreements, the Paper Company might elect to terminate the grant and release, and thereupon the mutual rights and obligations of the parties would be determined under and pursuant to the Deed of March 7, 1896, the Lease of March 7, 1896 and the Agreement of June 1, 1898.

The amounts of payments required to be made by the Licensee under the Agreements of 1919 and 1937 as aforesaid, were $82,500 for the 10 months following March 1, 1941 and $99,000 annually for the years 1942-1946 inclusive, which are the amounts disallowed by the Commission as operating expenses of the Licensee in this proceeding.

13. As appears from Findings Nos. 7, 9 and 10 and from the text of Opinion No. 200 (at pages 39 to 44 inclusive), the Commission has based its adjustments of project revenues with respect to the Pettebone-Cataract rights and the disallowances from operating expenses of the payments made to International Paper Company on the grounds that "there cannot be private ownership of the waters of a navigable river of the United States" (page 40), that the Licensee derived rights to use the Pettebone-Cataract and International Paper Company diversions, to the exclusion of the Pettebone-Cataract interests and of International Paper Company, under and by virtue of its Federal license, and

that the Licensee therefore "already owned such water rights" which it "already had obtained by the Federal license" (pages 41, 44).

Points on Which Petitioner Intends to Rely

14. The Petitioner believes and therefore alleges that it is aggrieved and substantially prejudiced and injured by the Order of the Commission. By force and effect of the Order, Petitioner is erroneously required to accrue into amortization reserve, as "surplus" or "excess" earnings, amounts which, in the one case, it did not in fact receive as project revenues, and which, in the other case, it actually paid out in discharge of a valid and subsisting contract obligation. This erroneous determination of amortization reserve liability thereby directly impairs the value of Petitioner's property and assets.

Furthermore, the prescription of these erroneous adjustments and disallowances as a precedent or rule for future periods presents to Petitioner, in respect of International Paper Company, with two prejudicial and injurious alternatives: either to continue its payments, required by contract, to International Paper Company, and suffer possible additional accruals to amortization reserve amounting to $49,500 (i.e., one-half of $99,000) annually; or to terminate its payments to International Paper Company and thereby expose itself to suit for damages and for possible reversion to International Paper Company of the rights of use of 730 cfs. In either case the value of Petitioner's property and assets is directly and substantially impaired.

Specifications of Error

15. The Petitioner states and assigns the following grounds and reasons for the granting by this Honorable Court of the relief prayed herein:

A. The Commission has erred as a matter of law in finding and concluding that the Licensee has, under its Project No. 16 License, the right to use the water power rights

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formerly owned and possessed by Pettebone-Cataract Paper Company and Cataract City Milling Company (namely, the right to draw from the Licensee's Canal Basin and to use, at a head of 100 feet, 262.6 cfs of water), in disregard and in violation of the rights of Niagara, Lockport and Ontario Power Company and of Buffalo Niagara Electric Corporation, as its successor, under the Deed and Agreement of May 1, 1925 as amended.

B. The Commission has erred as a matter of law in failing to find that the rights, formerly possessed by the Pettebone-Cataract Paper Company and Cataract City Milling Company, to divert water for power purposes from the Canal Basin of the Licensee were valid property rights created and subsisting under State law and deriving therefrom and were entitled as such to recognition and protection under the laws of the United States, and by the Commission in the administration of the Federal Power Act.

C. The Commission has erred as a matter of fact and law in failing to find that the said water power rights owned by the Pettebone-Cataract interests were recognized as valid and subsisting rights of property by the Commission at the time of issuance of the Project No. 16 License, March 2, 1921, and were expressly recognized in the terms of said License.

D. The Commission has erred as a matter of law in disregarding the rights of Buffalo Niagara Electric Corporation as successor to Niagara, Lockport and Ontario Power Company under the Deed and Agreement between Niagara Lockport and the Power Company dated May 1, 1925 as amended, and in failing to find and conclude that the rights of Buffalo Niagara Electric Corporation, as successor party under the said Deed and Agreement of May 1, 1925 as amended, and the obligations of the Licensee thereunder are valid, subsisting and enforceable rights and obligations under the laws of the State of New York and the laws of the United States and are entitled to recognition as such by the Commission.

E. The Commission has erred as a matter of law in finding and concluding that the rights for the use of water for power purposes at Niagara Falls, obtained by the Licensee under the Project No. 16 License issued March 2, 1921, were exclusive of the rights of International Paper Company subsisting under the Agreement of March 1, 1919 and under said Agreement as amended by the Agreement of August 1, 1937, derived from said Paper Company's ownership of water rights.

F. The Commission has erred as a matter of law in failing to find that the rights to divert for power purposes 730 cfs of water from the Adams Station Intake Canal of the Licensee, which were owned and possessed by International Paper Company prior to March 1, 1919, were vested rights of property, recognized under the laws of the State of New York as a corporeal hereditament and real estate, and were valid and subsisting property rights under the laws of the United States.

G. The Commission has erred as a matter of fact and law in failing to find and conclude that the rights of International Paper Company under its Agreement with the Power Company dated March 1, 1919 were valid and subsisting rights of property and under contract, and were recognized as such by the Commission at the time of issuance of the Project No. 16 License on March 2, 1921 and were expressly recognized in the terms of said License.

H. The Commission has erred as a matter of law in failing to find and conclude that the decision of the Supreme Court of the United States in the case of *International Paper Company* v. *United States*, 282 U. S. 399, is a controlling precedent and determinative of the issues presented in this proceeding with respect to the disallowance of payments made by the Licensee to International Paper Company under the Agreement of March 1, 1919 as amended by the Agreement of August 1, 1937.

I. The Commission has erred as a matter of law in disregarding the valid and subsisting rights of International Paper Company under its Agreement with the Power Com-

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pany dated March 1, 1919 as amended by the Agreement dated August 1, 1937, and in failing to find that said Agreement as amended was and is a valid and subsisting agreement, enforceable according to its terms under the laws of the State of New York and the laws of the United States and entitled to recognition as such by the Commission.

J. The Commission has erred, as a matter of fact and law, in failing to find and conclude that the United States by its Congress, officers and agencies in the Burton Act of 1906 (34 Stat. 626) and the administration of permits thereunder, and in Article V of the International Boundary Waters Treaty of 1909 (36 Stat. 2445), and in the issuance and administration of permits under Congressional Joint Resolutions in 1917, 1918 and 1919, and this Commission in the granting of the Project No. 16 License in 1921, have recognized the existence of the Pettebone-Cataract and International Paper Company rights as valid interests in the use of waters diverted by the Licensee's predecessors and the Licensee.

K. The Commission has erred as a matter of law in failing to find and conclude that the Licensee is bound under the laws of the State of New York and of the United States to recognize the validity of the outstanding rights and the existence of the contractual obligations based thereon and derived therefrom, which are provided in the said Deed and Agreement with Niagara, Lockport and Ontario Power Company and Buffalo Niagara Electric Corporation as its successor, dated May 1, 1925 as amended, and in the Agreement between the Licensee and International Paper Company dated May 1, 1919 as amended by Agreement dated August 1, 1937, and that the Licensee is obligated under the said laws to perform the said contractual obligations unless and until relieved therefrom by a judgment or decree of a court of competent jurisdiction.

L. The Commission has erred in respect of both fact and law in making adjustments by way of increase of project

revenues by the amount of $37,800 annually ($31,500 for the period March 2, 1941 to December 31, 1941) in respect to sales of power by the Licensee to Niagara, Lockport and Ontario Power Company and to Buffalo Niagara Electric Corporation as its successor, under and pursuant to the Deed and Agreement dated May 1, 1925 as amended.

M. The Commission has erred in respect of both fact and law in disregarding as operating expenses of the Licensee for the purposes of determining amortization reserve liability, payments of approximately $99,000 annually actually made by the Licensee to International Paper Company under and pursuant to the Agreement of March 1, 1919 as amended by the Agreement of August 1, 1937, as consideration for the use of valid water rights formerly owned and used by International Paper Company and by it granted to the Licensee by defeasible grant under said Agreement of March 1, 1919 and said Agreement as amended.

N. The Commission has erred in respect of both fact and law in determining amortization reserve liability of the Licensee for the period March 2, 1941 to December 31, 1946 on the basis of the erroneous adjustments of project revenues which are the subject of the preceding Specification designated L, and on the basis of the erroneous disallowances of operating expenses which are the subject of the preceding Specification designated M.

O. The Commission has erred as a matter of law to such extent, if any, as it may have indicated or prescribed in its Opinion No. 200, and particularly in Finding No. 5 thereof, the findings, conclusions, adjustments and disallowances referred to in the preceding Specifications designated A, E, L, M and N, as a rule for the future to be applicable to the years subsequent to 1946.

P. The Commission has erred as a matter of law and has acted in excess of its statutory authority in disregarding in its determinations in this proceeding valid and subsisting property rights and contractual rights relating thereto.

BLEED THROUGH-

Q. The Commission has erred as a matter of fact and law in ordering, in Clause (B) of its Order issued September 27, 1950, that the Licensee shall credit to Account 258.1, Amortization Reserve—Federal, the amount of $914,432.04, as representing one-half of its surplus earnings from normal operations of Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive.

R. By reason of the matters hereinabove alleged and the errors hereinabove specified, alleged, and set forth, the Order of the Commission issued September 27, 1950 deprives Petitioner of its property without due process of law, contrary to and in violation of the Constitution of the United States and the Fifth Amendment thereof.

S. By reason of the errors hereinabove specified, alleged and set forth, the adjustments of project revenues made by the Commission in respect of the Pettebone-Cataract water rights in Findings Nos. 6, 7 and 8 of its Opinion No. 200, the disallowance by the Commission of the payments to International Paper Company as operating expenses in Findings Nos. 9 and 10, and the findings of Earnings, Specified Return, Surplus Earnings and Amortization Reserve Credits set forth in Finding No. 4 of said Opinion (page 51), the credit to Amortization Reserve Account in the Amount of $914,432.04 ordered by Clause (B) of the Commission's Order herein issued September 27, 1950, and any finding or conclusion contained in Finding No. 5 of said Opinion which may purport to make such adjustments and disallowances applicable to succeeding years after the year 1946, are, and each of such determinations is, contrary to fact and erroneous in law, arbitrary and capricious, and violative of Licensee's rights under its contracts with Buffalo Niagara Electric Corporation and with International Paper Company, in violation of the License contract, in violation of the provisions of the Federal Power Act and the Constitution of the United States, particularly the Fifth Amendment thereof, in excess of the statutory authority of the Commission, in excess of the powers of the

United States and of this Commission under the Constitution of the United States, and contrary to and in violation of the constitutional rights, privileges and immunities of this Petitioner.

Dated, December 15, 1950.

Respectfully submitted,

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[Verified by Lauman Martin, Vice-President of Niagara Mohawk Power Corporation, December 18, 1950.]

* * * * * * * * * *

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Exhibit A to Petition for Review.

SECTION 10 (d) OF FEDERAL POWER ACT
(16 U. S. C. 803(d))

Sec. 10. All licenses issued under this Part shall be on the following conditions:

* * * * * * *

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserve shall be set forth in the license.

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Exhibit B to Petition for Review.

FINDING 4 AS MODIFIED.

4. Licensee's earnings from normal operations of Project No. 16 for the ten months of 1941, and each of the years 1942 through 1946, to be compared with a return of 6% per annum upon the base for computing the rate of return, the surplus earnings (or the deficit below 6% per annum) for the same periods, one-half of such surplus earnings to be credited to the amortization reserves on the cumulative basis shown, and the total amount to be credited to Account 258.1, Amortization Reserve, Federal, are as follows:

Period	Base	Earnings	Specified Return (6%)	Surplus Earnings	Amortization Reserve Credits
March 2, 1941 to December 31, 1941.....	$36,101,556.74	$ 2,366,131.61	$ 1,805,077.84	$ 561,053.77	$280,526.89
Year 1942	35,817,450.85	2,463,232.64	2,149,047.05	314,185.59	157,092.79
Year 1943	35,464,320.95	2,161,884.44	2,127,859.26	34,025.18	17,012.59
Year 1944	34,925,610.46	1,815,841.25	2,095,536.63	(279,695.38)	—
Year 1945	34,076,789.61	1,890,524.21	2,044,607.38	(154,083.17)	—
Year 1946	33,286,819.28	2,552,587.25	1,997,209.16	555,378.09	60,799.77
March 2, 1941 to December 31, 1946.....		$13,250,201.40	$12,219,337.32	$1,030,864.08	$515,432.04

419 FEDERAL POWER COMMISSION
BUREAU OF ACCOUNTS, FINANCE AND RATES
DIVISION OF ORIGINAL COST

PROJECT NO. 16—NEW YORK (NIAGARA FALLS)
THE NIAGARA FALLS POWER COMPANY, LICENSEE

Report on Operations

From March 2, 1921
(Effective Date of License)
To December 31, 1946, Inclusive

By
D. L. Walker, Sr.
Examiner of Accounts
Kenneth A. Miller
Supervising Accountant

Washington, D. C.
February 23, 1949.

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423 GENERAL

Nature and Purpose of Report—This is a report on the results of the operations of Project No. 16-N. Y. (Niagara Falls) by The Niagara Falls Power Company, Licensee, during the period from March 2, 1921, the effective date of the license, to December 31, 1946, inclusive, except that operations relating to the emergency diversion of 12,500 cfs of water over the normal diversion of 20,000 cfs are excluded herefrom.

The purpose of the instant report is to determine the amount of earnings, if any, to be set aside in amortization reserves, pursuant to the provisions of Article 11 of the license, as amended, and as required by Section 10(d) of the Federal Power Act.

Business of Licensee—The Niagara Falls Power Company is primarily engaged in supplying electric energy at wholesale to large industrial companies in and around the City of Niagara Falls, New York, and all of its properties devoted to electric operations are under license. It also supplies electric energy to a switching railroad and to other electric utilities, all of which are affiliated. Mechanical power is supplied to Aluminum Company of America the plant of which is contiguous to the Schoellkopf plant of Licensee.

License Provisions Re Diversion of Water—The License for Project No. 16, which was the first license issued by the Commission after the passage of the Federal Water Power Act in 1920, initially provided for the diversion of 19,500 cfs of water from the Niagara River. By Amendment No. 3, issued on December 13, 1926, an additional diversion
424 of 225 cfs was authorized, and by temporary license issued on October 1, 1928, and subsequently renewed from time to time, 275 cfs were authorized to be diverted, thus giving The Niagara Falls Power Company the right to divert and use for power purposes the entire 20,000 cfs authorized to be diverted on the United States side of the

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River in the Treaty between the United States and Great Britain.

In 1941, in order to meet the urgent demands for more power to meet war needs, the Commission, pursuant to special arrangements between the United States and Canada, by Amendment No. 4, effective June 12, 1941, and Amendment No. 5, effective November 29, 1941, authorized the additional diversion for temporary emergency use of 5,000 cfs and 7,500 cfs, respectively.

License Provisions Re Earnings—Article 11 of the License, which deals with surplus earnings, originally read as follows:

11. After the first 20 years of operation of the project under this license, the licensee shall establish and maintain amortization reserves out of the surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual legitimate investment of the licensee in such project, as such investment is specified and determined under the Act and under the rules and regulations of the Commission with respect thereto, which excess surplus is designated for such purpose in said rules and regulations as "Surplus Earnings."

Such specified rate of return, for the purposes of this license, shall be one and one-half times the weighted average annual interest rate payable on the par value of
425 the long-term debt of the licensee actually outstanding on account of project property and of nonproject property operated in connection therewith at the beginning of the period of amortization and of each calendar year thereafter. The phrase "long-term debt" shall include the classes thereof defined or prescribed from time to time in the accounting rules and regulations of the Commission.

In determining such weighted average annual interest rate, there shall be included in the interest payable according to the terms of the bonds, notes, or other evidences of such debt, discount (or premium) thereon and expenses incurred in connection with the issue and initial sale thereof,

such discount (or premium) and expenses for such purposes being prorated with respect to any items of such debt over the life of the security issued in respect thereof in the manner prescribed in the accounting rules and regulations of the Commission.

The following proportions of such surplus earnings shall be paid into and held in such amortization reserves; of all surplus earnings up to and including two per cent upon the actual legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of two per cent and not in excess of four per cent, 50 per cent thereof shall be so paid; of all surplus earnings in excess of four per cent and not in excess of six per cent, 70 per cent thereof shall be so paid; and of all such surplus earnings in excess of six per cent, 90 per cent thereof shall be so paid; *Provided:* That the Commission, if it finds that the earnings of the Licensee during the first 20 years of operation have not yielded a fair return upon the actual, legitimate investment in the project of the licensee, may limit the proportion of such surplus earnings to be paid into such amortization reserves to 10 per cent until such time as the accumulated earnings of the licensee represent in the judgment of the Commission a fair return upon such investment.

By Amendment No. 7, dated May 14, 1947, Article 11 was amended to read:

Article 11. After the first twenty (20) years of operation of the project under this license, namely after March 1, 1941, six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provisions of Section 10(d) of the Act for the establishment and
426 maintenance of amortization reserves to be held until termination of the license, or in the discretion of the Commission, to be applied from time to time in reduction of the net investment in the project, and one-half of all surplus earnings in excess of six (6) per cent per annum re-

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ceived in any calendar year shall be paid into and held in such amortization reserves.

In respect to the temporary emergency diversion of 12,500 cfs of water, Amendment No. 6 of the license prescribes special separate accounting for the revenues, expenses and profits, if any, received from the sale of energy produced from such diversion, and confirmed the provisions of Amendments No. 4 and No. 5 in respect to accounting for special facilities constructed and the annual allowance for depreciation thereon. By order entered January 4, 1949, and effective as of October 9, 1948 the Commission lifted the special restrictions relating to the accounting for revenues, expenses and profits from the production and sale of this additional energy.

Scope of the Report—In view of the fact that the emergency diversion of 12,500 cfs is still in effect and the results of operation in connection therewith accounted for separately by Licensee during the period covered herein, as provided in Amendment No. 6 of the license, this report deals only with the "normal" operations of the company, i.e., with the revenues, expenses and profits arising from the sale of electric energy and mechanical power produced by the 20,000 cfs of water which the licensee is authorized to divert under normal conditions.

* * * * * * * * * *

434 OPERATIONS FOR THE PERIOD MARCH 2, 1941 TO DECEMBER 31, 1946, INCLUSIVE

Introduction—As stated heretofore, the license for Project No. 16 was the first license granted by the Federal Power Commission and was effective March 2, 1921. Licensee entered the "amortization period" twenty years thereafter, or on March 2, 1941; however, for the purpose of this report, all of the records and accounts are assumed to be effective March 1, 1941.

Extent of Examination—The accounts and records of The Niagara Falls Power Company for the period from

March 1, 1941 through December 31, 1946 were analyzed in considerable detail. The water for power and power purchased accounts were analyzed for the entire period, and the revenue and other expense accounts were spot checked by analyzing each account in detail for the month in each year in which the largest charges were made.

Summary of Operations—Schedule No. 3 is a summary of results of operations, by years, for the period, March 1, 1941 to December 31, 1946, inclusive. This schedule is supported by Schedule No. 3-A, a condensed analysis of production expenses, and Schedule No. 3-B, a summary of administrative and general expenses. The details in support of these schedules are included in Schedules A, B, C, D, E, F and G and sub-schedules for each of the years 1941 to 1946, inclusive, which have been made available to Licensee and are incorporated herein by reference. Net operating income, by years, as adjusted herein, resulting from project normal operations is as follows:

435 Ten months ending 12/31/41	$ 2,480,131.61
Year 1942	2,600,032.64
Year 1943	2,298,684.44
Year 1944	1,952,641.25
Year 1945	2,027,324.21
Year 1946	2,689,387.25
Total—3/1/41 to 12/31/46	$14,048,201.40

Production Expenses

Reference is now made to Schedule No. 3-A, which is a condensed analysis of production expenses for the period, March 1, 1941 to December 31, 1946, inclusive, as adjusted for the purposes of this report. Certain of the items are commented on below:

Water for Power—Contract with Buffalo Niagara Electric Corporation—Licensee, under the terms of a contract dated May 1, 1925, with Niagara, Lockport and Ontario

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Power Company (an affiliate later merged with certain other companies into Buffalo Niagara Electric Corporation, present parent of Licensee) delivers 2,000 kw of electric power to Buffalo Niagara at the low price of $6.70 per kw per annum, plus a payment of $2,400 per year as "water rental" relating to the use of 262.6 cfs of water at a head of 100 feet which, it is alleged, Buffalo Niagara, as successor to Niagara Lockport, has the right to draw from the canal basin of Licensee.

The alleged right to the use of this water was acquired by Niagara, Lockport, and Ontario Power Company from Pettebone Cataract Paper Company and Cataract
436 City Milling Company, which companies had in turn acquired the claimed right from the assigns of C. B. Gaskill. Gaskill acquired certain lands in the hydraulic basin at Niagara Falls from A. M. Chesbrough, in 1878. Chesbrough had acquired the land and the claimed right to the use of the water as a part of a transaction in which he and J. F. Schoellkopf had acquired the hydraulic canal and basin from one H. H. Day in 1877. After the purchase by Chesbrough and Schoellkopf, the partners quitclaimed, each to the other, certain lands, or "mill sites," with the "right" to take from the hydraulic basin enough water to develop 900 h.p. at 50-foot head and work down the high bank to a depth of 100 feet, before any of the water in the basin would be utilized for any other purposes. Schoellkopf then purchased Chesbrough's interest in the remainder of the lands and alleged rights obtained from Day and placed them in The Niagara Falls Hydraulic Power and Manufacturing Company, a predecessor in interest to the present licensee of Project No. 16.

From 1878 to 1925, the 262.6 cfs of water were used by Gaskill and his successors in interest. Early in 1925, Niagara, Lockport and Ontario Power Company entered into a contract with the Pettebone and Cataract City interests to purchase all of the lands, buildings and the right, if any, to the use of the water then held by the latter companies for

$725,000 plus the assumption of judgments of approximately $172,000 which Licensee held against the Pettebone and Cataract interests. As soon as the purchase by Niagara Lockport was consummated, Niagara Lockport entered into an agreement, dated May 1, 1925 with
437 The Niagara Falls Power Company under the terms of which The Niagara Falls Power Company acquired the land and building formerly owned by the Pettebone and Cataract interests in consideration of the satisfaction of the judgments and leased the alleged right to the use of the 262.6 cfs of water on the terms set forth in the first paragraph of this discussion.

On February 17, 1947, The Niagara Falls Power Company filed an application with the Commission which was in substance for authority to include as part of the cost of the project the proposed purchase of the alleged right of Buffalo Niagara Electric Corporation to the 262.6 cfs of water. By Opinion No. 159, and order entered November 17, 1947, the Commission held that in the license for Project No. 16 the 262.6 cfs was a part of the water authorized to be diverted and used by The Niagara Falls Power Company for power purposes; that Buffalo Niagara Electric Corporation had no authority from the United States to use any of the water from the Niagara River, and denied the application thereby rejecting the proposed inclusion in project accounts of any purchase money contemplated to be paid to Buffalo Niagara Electric Corporation for such alleged water right.

In view of the Commission's decision in respect to this claimed right, for the purposes of this report, the revenues received from other electric utilities have been increased by $31,100.00 for the ten-month period ended December 31, 1941, and by $37,800.00 for each of the years 1942 to 1946, inclusive, on the premise that except for the agreement relating to the alleged water right, Buffalo Niagara Electric Corporation would have paid for the 2,000 kw of energy received under the contract of May 1, 1925

BLEED THROUGH-

438 at the same rate as it paid for other energy purchased from Licensee, which was at the rate of $26.80 per kw per year.

Water for Power—International Paper Company—In this category are payments to the International Paper Company of $99,000.00 per annum resulting from a contract with that company which was the outgrowth of a deed dated March 7, 1896 from The Niagara Falls Power Company (Constituent) to Niagara Falls Paper Company (now International Paper Company) in which the Paper Company was deeded approximately 11.75 acres of land together with the "right" of the Paper Company to "take, develop and use upon the premises hereby granted" water sufficient to produce 3,000 horse power for which the Paper Company was to pay $24,000.00 per year. A supplemental agreement dated the same day between the two companies gave the Paper Company, in addition to the 3,000 horsepower, the purported right to take, at its option and after ten (10) days' written notice, 2,900 additional horse power for the sum of $29,000.00 payable annually, and further, an additional right to take not less than 500 horse power at the rate of $10.00 per horse power per annum.

On March 1, 1919, the two parties entered into an agreement whereby the Paper Company surrendered its claimed right to the use of the water upon agreement of the Power Company to pay to it $99,000.00 per year. This was conditioned upon the Paper Company taking a fixed annual amount of firm power aggregating 8,750 ehp at the rate of $20.00 per ehp per year or $175,000.00.

439 Under the terms of the agreement of March 1, 1919, the provisions thereof were to continue in force as long as the Power Company "shall continue to divert or shall be entitled to divert water from the Niagara River for use in the development of power." However, on August 1, 193[illegible], the agreement of March 1, 1919 was modified to the extent that the payments for electric power by the Paper Company were placed on the same basis as

other industrial customers of the Power Company. This new power contract was the result of an order of the New York Public Service Commission in Case No. 9002 fixing the rates to be charged by the Power Company for electric energy furnished industrial consumers in the City of Niagara Falls, New York.

The alleged right of the International Paper Company to take water from the works of The Niagara Falls Power Company is founded on the same premise that Licensee argued that the Pettebone Cataract interests had in respect to the 262.6 cfs of water which was the subject of Opinion No. 159 entered by the Commission on November 17, 1947. Therefore, for the purposes of this report, the payment of $82,500 in the ten months ending December 31, 1941, and the payments of $99,000 in each of the years 1942 to 1946, inclusive, to the International Paper Company for "water for power" have been eliminated from Licensee's claimed production expenses.

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449 *Rate of Return.*

Schedule No. 4 shows the rate of return of Licensee from normal operations, by years, for the period from March 2, 1941 to December 31, 1946, inclusive. This schedule is supported by Schedule No. 4-A, which shows the average plant investment; Schedule No. 4-B, which shows the average balance in the reserve for depreciation, and Schedules Nos. 4-C and 4-D, which show the portions of material and supplies and operating expenses respectively, allowed as cash working capital.

450 It is noted that the rate of return for the ten months ended December 31, 1941 was 6.87% or at the rate of 8.22% on an annual basis. The return for the year 1942 was 7.26%; for the year 1943, it was 6.48% for the year 1944, it was 5.59%, for the year 1945 it was 5.95%, and for the year 1946, it was 8.08%.

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BLEED THROUGH-

451 *Earnings in Excess of Specified Rate of Return*

Licensee entered the "amortization period" March 2, 1941. Therefore, the provisions of Article 11 of the license as amended are now in effect. Article 11 as amended reads:

"After the first twenty (20) years of operation of the project under this license, namely after March 1, 1941, six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provisions of Section 10(d) of the Act for the establishment and maintenance of amortization reserves to be held until termination of the license, or in the discretion of the Commission, to be applied from time to time in reduction of the net investment in the project, and one-half of all surplus earnings in excess of six (6) per cent per annum received in any calendar year shall be paid into and held in such amortization reserves."

Application of the provisions of Article 11 of the license, as amended, develops that for the period from March 2, 1941 to December 31, 1946, inclusive, a total of $994,521.33 should be set aside in Account No. 258.1, Amortization Reserve-Federal.

Schedule No. 5 shows, by years, the base upon which the specified return is calculated; operating income;
452 specified return; excess income over the specified return, and the amount to be credited to the amortization reserve. The latter amount, as shown by the schedule, is made up as follows:

Period	Amount
3/1/41 to 12/31/41	$337,526.89
Year 1942	225,492.80
" 1943	85,412.59
" 1944	—o—
" 1945	—o—
" 1946	346,089.05
Total	$994,521.33

Recommendations

It is recommended that an appropriate order be issued requiring Licensee to transfer the sum of $994,521.33 from Account No. 271, Earned Surplus, to Account No. 258.1, Amortization Reserve-Federal, as the excess earnings from March 2, 1941 to December 31, 1946, inclusive, to be held in such amortization reserve pursuant to the provisions of Article 11 of the license, as amended, and as required by Section 10(d) of the Federal Power Act.

453 Respectfully submitted,

D. L. WALKER, SR.
Examiner of Accounts

KENNETH A. MILLER
Supervising Accountant

Approved:

R. C. RAINWATER, *Chief*
Division of Original Cost

CHAS. W. SMITH, *Chief*
Bur. of Accounts, Finance and Rates

Washington, D. C.,
February 23, 1949

BLEED THROUGH-

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Schedule No. 1.

SUMMARY OF OPERATING INCOME, BY YEARS FOR THE PERIOD, MARCH 2, 1921 TO FEBRUARY 28, 1941, INCLUSIVE

Period	Operating Revenues	Operating Revenue Deductions			Operating Income
		Total	Operating Expenses	Other	
10 Months Ended 12/31/1921	$ 3,968,302.53	$ 1,693,760.36	$ 770,974.52	$ 922,785.84	$ 2,274,542.17
Year 1922	5,284,302.66	2,082,014.55	827,535.55	1,254,479.00	3,202,288.11
1923	5,765,599.33	2,579,559.20	1,166,863.92	1,412,695.28	3,186,040.13
1924	6,533,171.06	2,782,492.27	1,221,683.27	1,560,809.00	3,750,678.79
1925	7,109,923.81	3,084,017.42	1,220,590.35	1,863,427.07	4,025,906.39
1926	7,532,367.22	3,202,269.27	1,292,209.96	1,910,059.31	4,330,097.95
1927	7,729,169.98	3,632,797.02	1,245,548.09	2,387,248.93	4,096,372.96
1928	7,858,121.11	3,462,821.04	1,188,171.65	2,274,649.39	4,395,300.07
1929	8,214,351.17	3,320,547.49	1,041,988.65	2,278,558.84	4,893,803.68
1930	8,209,350.61	3,094,850.43	962,285.14	2,132,565.29	5,114,500.18
1931	9,252,395.69	3,292,359.30	1,250,394.45	2,041,964.85	5,960,036.39
1932	7,774,986.74	3,086,460.83	927,098.01	2,159,362.82	4,688,525.91
1933	7,263,491.39	2,745,546.14	852,552.10	1,892,994.04	4,517,945.25
1934	8,105,857.16	3,904,879.66	1,767,279.04	2,137,600.62	4,200,977.50
1935	8,135,972.08	4,213,011.48	1,851,258.18	2,361,753.30	3,922,960.60
1936	8,274,077.16	4,462,462.13	2,152,553.77	2,309,908.36	3,811,615.03
1937	9,949,376.14	6,175,475.87	3,087,888.07	3,087,587.80	3,773,900.27
1938	8,333,063.93	5,523,913.01	2,341,332.49	3,182,580.52	2,809,150.92
1939	8,121,357.98	5,944,540.63	2,741,586.92	3,202,953.71	2,176,817.35
1940	11,152,425.73	8,176,813.38	4,563,440.19	3,613,373.19	2,975,612.35
Two Months Ended 2/28/1941	2,089,654.74	1,585,631.04	959,554.35	626,076.69	504,023.70
Total	$156,657,318.22	$78,046,222.52	$33,432,788.67	$44,613,433.85	$78,611,095.70

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Schedule No. 2.

RATE OF RETURN FIRST TWENTY YEARS OF OPERATIONS OF LICENSE MARCH 2, 1921 TO FEBRUARY 28, 1941, INCLUSIVE.

Period	Investment			Working Capital			Return		
	Average Plant Investment	Average Reserve for Depreciation	Average Net Investment	Average Material and Supplies	Operating Expenses	Total	Base	Operating Income	Rate
3/2/1921 to 12/31/1921	$29,283,027.36	$ 2,660,911.37	$26,622,115.99	$255,091.80	$ 79,988.46	$335,080.26	$26,957,196.25	$2,274,542.17	8.44a
Year 1922	32,822,138.35	2,951,453.81	29,870,684.54	294,404.83	91,904.28	386,309.11	30,256,993.65	3,202,288.11	10.58
1923	37,301,556.69	2,819,211.76	34,482,344.93	297,406.86	108,120.78	405,527.64	34,887,872.57	3,186,040.13	9.13
1924	40,980,364.45	2,705,731.01	38,274,633.44	267,578.75	138,637.80	406,216.55	38,680,849.99	3,750,678.79	9.70
1925	42,746,308.86	3,173,464.39	39,572,844.47	250,936.98	152,573.79	403,510.77	39,976,355.24	4,025,906.39	10.07
1926	43,906,024.45	3,780,631.63	40,125,392.82	266,093.97	161,526.25	427,620.22	40,553,013.04	4,330,097.95	10.68
1927	44,791,585.75	4,426,959.81	40,364,625.94	259,111.63	155,693.51	414,805.14	40,779,431.08	4,096,372.96	10.05
1928	44,862,276.05	4,954,413.49	39,907,862.56	224,718.04	148,521.46	373,239.50	40,281,102.06	4,395,300.07	10.91
1929	44,974,474.15	5,581,146.21	39,393,327.94	222,921.86	129,963.52	352,885.38	39,746,213.32	4,893,803.68	12.31
1930	45,249,525.73	6,187,488.87	39,062,036.86	219,767.57	120,285.64	340,053.21	39,402,090.07	5,114,500.18	12.98
1931	45,858,131.19	6,531,922.63	39,326,208.56	196,102.05	122,174.31	318,276.36	39,644,484.92	5,960,036.39	15.03
1932	46,385,244.91	6,737,776.37	39,647,468.54	169,756.48	115,887.25	285,643.73	39,933,112.27	4,688,525.91	11.74
1933	46,383,214.47	6,926,069.62	39,457,144.85	157,739.06	106,569.01	264,308.07	39,721,452.92	4,517,945.25	11.37
1934	46,378,349.93	7,323,157.84	39,055,192.09	159,650.96	107,734.88	267,385.84	39,322,577.93	4,200,977.50	10.68
1935	46,350,602.36	7,797,586.17	38,553,016.19	162,386.69	118,232.27	280,618.96	38,833,635.15	3,922,960.60	10.10
1936	46,244,830.23	8,247,208.26	37,997,621.97	159,769.93	121,769.79	281,539.72	38,279,161.69	3,811,615.03	9.96
1937	46,134,297.79	8,740,411.68	37,393,886.11	148,842.50	132,630.74	281,473.24	37,675,359.35	3,773,900.27	10.02
1938	46,280,321.89	9,225,245.82	37,055,076.07	125,749.70	144,012.83	269,762.53	37,324,838.60	2,809,150.92	7.53
1939	46,273,827.73	9,677,613.98	36,596,213.75	110,334.28	194,467.75	304,802.03	36,901,015.78	2,176,817.35	5.90
1940	46,371,004.62	10,180,242.84	36,190,761.78	113,053.12	160,885.48	273,938.60	36,464,700.38	2,975,612.35	8.16
1/1/1941 to 2/28/1941	46,676,647.30	10,550,685.34	36,125,961.96	113,053.12	25,095.44	138,148.56	36,264,110.52	504,023.70	1.39b
						Aggregates	$791,885,566.78	$78,611,095.70	9.93
						Averages	39,594,278.33	3,930,554.79	9.93

a For part of year only. Equated to an annual basis the rate would be 10.13%
b For part of year only. Equated to an annual basis the rate would be 8.34%

BLEED THROUGH—

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Schedule No. 3

SUMMARY OF RESULTS OF NORMAL OPERATIONS BY YEARS, FOR THE PERIOD, MARCH 2, 1941 TO DECEMBER 31, 1946, INCLUSIVE, AS ADJUSTED

	Ten Months Ended Dec. 31, 1941 (Schedule A)	1942 (Schedule B)	1943 (Schedule C)	1944 (Schedule D)	1945 (Schedule E)	1946 (Schedule F)	Total for Period
Operating Income—Electric							
Electric Operating Revenues							
Sales of Electric Energy To:							
Commercial and Industrial Companies	$ 9,332,030.98	$11,161,250.90	$11,232,936.32	$10,811,594.33	$11,029,765.17	$11,058,768.73	$64,626,346.43
Public Authorities	21,461.48	27,225.73	30,241.26	31,237.00	31,902.78	31,319.39	173,387.64
Other Electric Utilities	1,231,449.04	1,151,786.21	1,221,851.93	1,144,818.97	1,145,377.31	1,108,156.58	7,003,440.04
Railroads and Railways	22,021.92	30,350.71	31,268.58	30,401.28	32,205.52	29,061.26	175,309.27
Total Sales of Electric Energy	10,606,963.42	12,370,613.55	12,516,298.09	12,018,051.58	12,239,250.78	12,227,305.96	71,978,483.38
Other Electric Revenues							
Rent from Electric Property	17,426.36	22,966.23	24,144.59	23,967.17	23,940.43	24,355.18	136,799.96
Mechanical Power Furnished Others	347,742.68	417,332.73	417,314.71	415,306.35	416,632.70	417,362.71	2,431,691.88
Transmission of Electric Energy for Others	103,150.00	132,946.00	210,450.00	210,450.00	210,450.00	210,450.00	1,077,896.00
Miscellaneous Electric Revenues	2,211.36	3,336.68	3,017.96	1,495.75	1,358.48	1,283.32	12,703.55
Total Other Electric Revenues	470,530.40	576,581.64	654,927.26	651,219.27	652,381.61	653,451.21	3,659,091.39
Total Electric Operating Revenues	11,077,493.82	12,947,195.19	13,171,225.35	12,669,270.85	12,891,632.39	12,880,757.17	75,637,574.77
Operating Expenses—Electric							
Production Expenses—Hydraulic	4,735,667.23	5,629,253.99	5,519,260.20	5,147,287.72	5,461,498.03	5,378,311.34	31,871,278.51
Transmission Expenses	199,003.20	267,803.43	298,092.31	289,704.90	281,519.60	282,208.92	1,618,332.36
Distribution Expenses	10,751.08	15,268.48	19,478.40	17,598.32	16,531.78	19,826.96	99,455.02
Customers' Accounting and Collecting Expenses	3,912.62	5,593.74	6,030.77	7,301.30	6,037.98	5,969.12	34,845.53
Sales Promotion Expenses	2,216.35	1,146.15	2,535.34	3,279.23	1,132.57	.....	10,309.64
Administrative and General Expenses	499,582.83	690,327.81	705,733.16	703,015.21	665,282.90	724,537.93	3,988,479.84
Total Operating Expenses	5,451,133.31	6,609,393.60	6,551,130.18	6,168,186.68	6,432,002.86	6,410,854.27	37,622,700.90
Other Operating Revenue Deductions							
Depreciation and Amortization of Electric Plant	649,791.67	790,000.00	794,500.00	694,500.00	694,500.00	694,500.00	4,317,791.67
Federal Income and Excess Profits Taxes	593,537.67	711,302.07	912,339.97	792,838.20	667,437.21	.....	3,677,455.12
Other Taxes	1,569,566.22	1,836,466.88	1,864,570.76	1,961,104.72	1,970,368.11	1,986,015.65	11,188,092.34
New York State Water Charge	333,333.34	400,000.00	750,000.00	1,100,000.00	1,100,000.00	1,100,000.00	4,783,333.34
Total Other Operating Revenue Deductions	3,146,228.90	3,737,768.95	4,321,410.73	4,548,442.92	4,432,305.32	3,780,515.65	23,966,672.47
Total Operating Revenue Deductions	8,597,362.21	10,347,162.55	10,872,540.91	10,716,629.60	10,864,308.18	10,191,369.92	61,589,373.37
Operating Income as Adjusted	$ 2,480,131.61	$ 2,600,032.64	$ 2,298,684.44	$ 1,952,641.25	$ 2,027,324.21	$ 2,689,387.25	$14,048,201.40

BLEED THROUGH-

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476 **Schedule A**

SUMMARY OF INCOME FROM NORMAL OPERATIONS FOR THE PERIOD, MARCH 2, 1941 TO DECEMBER 31, 1941, INCLUSIVE.

	Total (From Sch. A-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$9,332,030.98	.....	$9,332,030.98
Public Authorities	21,461.48	.....	21,461.48
Other Electric Utilities	1,197,949.04[1]	33,500.00	1,231,449.04
Railroads and Railways	22,021.92	.....	22,021.92
Total Sales of Electric Energy	10,573,463.42	33,500.00	10,606,963.42
Other Electric Revenues			
Rent from Electric Property	17,426.36	.....	17,426.36
Mechanical Power Furnished Others	347,742.68	.....	347,742.68
Transmission of Electric Energy for Others	103,150.00	.....	103,150.00
Miscellaneous Electric Revenues	4,211.36[1]	(2,000.00)	2,211,36
Total Other Electric Revenues	472,530.40	(2,000.00)	470,530.40
Total Electric Operating Revenues	11,045,993.82	31,500.00	11,077,493.82
Operating Expenses—Electric			
Production Expenses—Hydraulic	4,818,167.23[2]	(82,500.00)	4,735,667.23
Transmission Expenses	199,003.20	.....	199,003.20
Distribution Expenses	10,751.08	.....	10,751.08
Customers' Accounting and Collecting Expenses	3,912.62	.....	3,912.62
Sales Promotion Expenses	2,216.35	.....	2,216.35
Administrative and General Expenses	499,582.83	.....	499,582.83
Total Operating Expenses	5,533,633.31	(82,500.00)	5,451,133.31
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	649,791.67	.....	649,791.67
Federal Income and Excess Profits Taxes	593,537.67	.....	593,537.67
Other Taxes	1,569,566.22	.....	1,569,566.22
New York State Water Charge	333,333.34	.....	333,333.34
Total Other Operating Revenue Deductions	3,146,228.90	.....	3,146,228.90
Total Operating Revenue Deductions	8,679,862.21	(82,500.00)	8,597,362.21
Operating Income	$2,366,131.61	$114,000.00	$2,480,131.61

[1] To adjust sale of 2,000 K. W. of energy to B. N. E. Corp. (N. L. & O. P. Co.) as per pages 13-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 of Report on Operations dated March 10, 1948.

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BLEED THROUGH-

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Schedule B

SUMMARY OF INCOME FROM NORMAL OPERATIONS YEAR 1942.

	Total (From Sch. B-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$11,161,250.90	.....	$11,161,250.90
Public Authorities	27,225.73	.....	27,225.73
Other Electric Utilities	1,111,586.21[1]	40,200.00	1,151,786.21
Railroads and Railways	30,350.71	.....	30,350.71
Total Sales of Electric Energy	12,330,413.55	40,200.00	12,370,613.55
Other Electric Revenues			
Rent from Electric Property	22,966.23	.....	22,966.23
Mechanical Power Furnished Others	417,332.73	.....	417,332.73
Transmission of Electric Energy for Others	132,946.00	.....	132,946.00
Miscellaneous Electric Revenues	5,736.68[1]	(2,400.00)	3,336.68
Total Other Electric Revenues	578,981.64	(2,400.00)	576,581.64
Total Electric Operating Revenues	12,909,395.19	37,800.00	12,947,195.19
Operating Expenses—Electric			
Production Expenses—Hydraulic	5,728,253.99[2]	(99,000.00)	5,629,253.99
Transmission Expenses	267,803.43	.....	267,803.43
Distribution Expenses	15,268.48	.....	15,268.48
Customers' Accounting and Collecting Expenses	5,593.74	.....	5,593.74
Sales Promotion Expenses	1,146.15	.....	1,146.15
Administrative and General Expenses	690,327.81	.....	690,327.81
Total Operating Expenses	6,708,393.60	(99,000.00)	6,609,393.60
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	790,000.00	.....	790,000.00
Federal Income and Excess Profits Taxes	711,302.07	.....	711,302.07
Other Taxes	1,836,466.88	.....	1,836,466.88
New York State Water Charge	400,000.00	.....	400,000.00
Total Other Operating Revenue Deductions	3,737,768.95	.....	3,737,768.95
Total Operating Revenue Deductions	10,446,162.55	(99,000.00)	10,347,162.55
Operating Income	$2,463,232.64	$136,800.00	$2,600,032.64

[1] To adjust sale of 2,000 K.W. of energy to B.N.E. Corp. (N.L. & O.P. Co.) as per pages 13-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 of Report on Operations dated March 10, 1948.

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496. **Schedule C**

SUMMARY OF INCOME FROM NORMAL OPERATIONS YEAR 1943.

	Total (From Sch. C-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$11,232,936.32	.....	$11,232,936.32
Public Authorities	30,241.26	.....	30,241.26
Other Electric Utilities	1,181,651.93[1]	40,200.00	1,221,851.93
Railroads and Railways	31,268.58	.....	31,268.58
Total Sales of Electric Energy	12,476,098.09	40,200.00	12,516,298.09
Other Electric Revenues			
Rent from Electric Property	24,144.59	.....	24,144.59
Mechanical Power Furnished Others	417,314.71	.....	417,314.71
Transmission of Electric Energy for Others	210,450.00	.....	210,450.00
Miscellaneous Electric Revenues	5,417.96[1]	(2,400.00)	3,017.96
Total Other Electric Revenues	657,327.26	(2,400.00)	654,927.26
Total Electric Operating Revenues	13,133,425.35	37,800.00	13,171,225.35
Operating Expenses—Electric			
Production Expenses—Hydraulic	5,618,260.20[2]	(99,000.00)	5,519,260.20
Transmission Expenses	298,092.31	.....	298,092.31
Distribution Expenses	19,478.40	.....	19,478.40
Customers' Accounting and Collecting Expenses	6,030.77	.....	6,030.77
Sales Promotion Expenses	2,535.34	.....	2,535.34
Administrative and General Expenses	705,733.16	.....	705,733.16
Total Operating Expenses	6,650,130.18	(99,000.00)	6,551,130.18
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	794,500.00	.....	794,500.00
Federal Income and Excess Profits Taxes	912,339.97	.....	912,339.97
Other Taxes	1,864,570.76	.....	1,864,570.76
New York State Water Charge	750,000.00	.....	750,000.00
Total Other Operating Revenue Deductions	4,321,410.73	.....	4,321,410.73
Total Operating Revenue Deductions	10,971,540.91	(99,000.00)	10,872,540.91
Operating Income	$2,161,884.44	$136,800.00	$2,298,684.44

[1] To adjust sale of 2,000 K.W. of energy to B.N.E. Corp. (N.L. & O.P. Co.) as per pages 13-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 of Report on Operations dated March 10, 1948.

BLEED THROUGH-

Schedule D

SUMMARY OF INCOME FROM NORMAL OPERATIONS YEAR 1944.

	Total (From Sch. D-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$10,811,594.33	.....	$10,811,594.33
Public Authorities	31,237.00	.....	31,237.00
Other Electric Utilities	1,104,618.97[1]	40,200.00	1,144,818.97
Railroads and Railways	30,401.28	.....	30,401.28
Total Sales of Electric Energy	11,977,851.58	40,200.00	12,018,051.58
Other Electric Revenues			
Rent from Electric Property	23,967.17	.....	23,967.17
Mechanical Power Furnished Others	415,306.35	.....	415,306.35
Transmission of Electric Energy for Others	210,450.00	.....	210,450.00
Miscellaneous Electric Revenues	3,895.75[1]	(2,400.00)	1,495.75
Total Other Electric Revenues	653,619.27	(2,400.00)	651,219.27
Total Electric Operating Revenues	12,631,470.85	37,800.00	12,669,270.85
Operating Expenses—Electric			
Production Expenses—Hydraulic	5,246,287.72[2]	(99,000.00)	5,147,287.72
Transmission Expenses	289,704.90	.....	289,704.90
Distribution Expenses	17,598.32	.....	17,598.32
Customers' Accounting and Collecting Expenses	7,301.30	.....	7,301.30
Sales Promotion Expenses	3,279.23	.....	3,279.23
Administrative and General Expenses	703,015.21	.....	703,015.21
Total Operating Expenses	6,267,186.68	(99,000.00)	6,168,186.68
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	694,500.00	.....	694,500.00
Federal Income and Excess Profits Taxes	792,838.20	.....	792,838.20
Other Taxes	1,961,104.72	.....	1,961,104.72
New York State Water Charge	1,100,000.00	.....	1,100,000.00
Total Other Operating Revenue Deductions	4,548,442.92	.....	4,548,442.92
Total Operating Revenue Deductions	10,815,629.60	(99,000.00)	10,716,629.60
Operating Income	$1,815,841.25	$136,800.00	$1,952,641.25

[1] To adjust sale of 2,000 K.W. of energy to B.N.E. Corp. (N.L. & O.P. Co.) as per pages 8-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 Report on Operations dated March 10, 1948.

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SUMMARY OF INCOME FROM NORMAL OPERATIONS YEAR 1945.

	Total (From Sch. E-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$11,029,765.17	.....	$11,029,765.17
Public Authorities	31,902.78	.....	31,902.78
Other Electric Utilities	1,105,177.31[1]	40,200.00	1,145,377.31
Railroads and Railways	32,205.52	.....	32,205.52
Total Sales of Electric Energy	12,199,050.78	40,200.00	12,239,250.78
Other Electric Revenues			
Rent from Electric Property	23,940.43	.....	23,940.43
Mechanical Power Furnished Others	416,632.70	.....	416,632.70
Transmission of Electric Energy for Others	210,450.00	.....	210,450.00
Miscellaneous Electric Revenues	3,758.48[1]	(2,400.00)	1,358.48
Total Other Electric Revenues	654,781.61	(2,400.00)	652,381.61
Total Electric Operating Revenues	12,853,832.39	37,800.00	12,891,632.39
Operating Expenses—Electric			
Production Expenses—Hydraulic	5,560,498.03[2]	(99,000.00)	5,461,498.03
Transmission Expenses	281,519.60	.....	281,519.60
Distribution Expenses	16,531.78	.....	16,531.78
Customers' Accounting and Collecting Expenses	6,037.98	.....	6,037.98
Sales Promotion Expenses	1,132.57	.....	1,132.57
Administrative and General Expenses	665,282.90	.....	665,282.90
Total Operating Expenses	6,531,002.86	(99,000.00)	6,432,002.86
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	694,500.00	.....	694,500.00
Federal Income and Excess Profits Taxes	667,437.21	.....	667,437.21
Other Taxes	1,970,368.11	.....	1,970,368.11
New York State Water Charge	1,100,000.00	.....	1,100,000.00
Total Other Operating Revenue Deductions	4,432,305.32	.....	4,432,305.32
Total Operating Revenue Deductions	10,963,308.18	(99,000.00)	10,864,308.18
Operating Income	$1,890,524.21	$136,800.00	$2,027,324.21

[1] To adjust sale of 2,000 K.W. of energy to B. N. E. Corp. (N. L. & O. P. Co.) as per pages 13-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 of Report on Operations dated March 10, 1948.

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26 **Schedule F**

SUMMARY OF INCOME FROM NORMAL OPERATIONS YEAR 1946

	Total (From Sch. F-1)	Adjustments	Total as Adjusted
Operating Income—Electric			
Electric Operating Revenues			
Sales of Electric Energy To:			
Commercial and Industrial Companies	$11,058,768.73	.....	$11,058,768.73
Public Authorities	31,319.39	.....	31,319.39
Other Electric Utilities	1,067,956.58[1]	40,200.00	1,108,156.58
Railroads and Railways	29,061.26	.....	29,061.26
Total Sales of Electric Energy	12,187,105.96	40,200.00	12,227,305.96
Other Electric Revenues			
Rent from Electric Property	24,355.18	.....	24,355.18
Mechanical Power Furnished Others	417,362.71	.....	417,362.71
Transmission of Electric Energy for Others	210,450.00	.....	210,450.00
Miscellaneous Electric Revenues	3,683.32[1]	(2,400.00)	1,283.32
Total Other Electric Revenues	655,851.21	(2,400.00)	653,451.21
Total Electric Operating Revenues	12,842,957.17	37,800.00	12,880,757.17
Operating Expenses—Electric			
Production Expenses—Hydraulic	5,477,311.34[2]	(99,000.00)	5,378,311.34
Transmission Expenses	282,208.92	.....	282,208.92
Distribution Expenses	19,826.96	.....	19,826.96
Customers' Accounting and Collecting Expenses	5,969.12	.....	5,969.12
Sales Promotion Expenses	.....	.....	.....
Administrative and General Expenses	724,537.93	.....	724,537.93
Total Operating Expenses	6,509,854.27	(99,000.00)	6,410,854.27
Other Operating Revenue Deductions			
Depreciation and Amortization of Electric Plant	694,500.00	.....	694,500.00
Federal Income Taxes	.....	.....	.....
Other Taxes	1,986,015.65	.....	1,986,015.65
New York State Water Charge	1,100,000.00	.....	1,100,000.00
Total Other Operating Revenue Deductions	3,780,515.65	.....	3,780,515.65
Total Operating Revenue Deductions	10,290,369.92	(99,000.00)	10,191,369.92
Operating Income	$2,552,587.25	$136,800.00	$2,689,387.25

[1] To adjust sale of 2,000 K.W. of energy to B. N. E. Corp. (N. L. & O. P. Co.) as per pages 13-16 of Report on Operations dated March 10, 1948.

[2] To eliminate payment to International Paper Co. for water for power as per pages 16-18 of Report on Operations dated March 10, 1948.

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Schedule No. 3-A.

CONDENSED ANALYSIS OF PRODUCTION EXPENSES.
MARCH 1, 1941 TO DECEMBER 31, 1946, INCLUSIVE, AS ADJUSTED.

	Ten Months Ended Dec. 31, 1941	1942	1943	1944	1945	1946	Total for Period
Water for Power							
Payments to International Paper Company	$ 82,500.00	$ 99,000.00	$ 99,000.00	$ 99,000.00	$ 99,000.00	$ 99,000.00	$ 577,500.00
Purchased Power							
Purchased from Others	1,316,255.63	1,770,797.13	1,764,084.48	1,458,645.58	1,986,871.49	1,651,171.61	9,947,825.92
Steam Plant Standby Charge	1,125,000.00	1,350,000.00	1,350,000.00	1,350,000.00	1,350,000.00	1,350,000.00	7,875,000.00
Power Interchanged (Net)	1,944,523.08	2,005,645.95	1,881,987.80	1,775,685.74	1,533,448.56	1,787,877.30	10,929,168.43
Total Purchased Power	4,385,778.71	5,126,443.08	4,996,072.28	4,584,331.32	4,870,320.05	4,789,048.91	28,751,994.35
Other Production Expenses							
Operation	233,452.07	350,418.14	384,460.02	363,934.25	364,350.98	360,465.12	2,057,080.58
Maintenance	115,641.45	151,391.77	137,737.65	198,162.65	226,429.00	227,851.31	1,057,213.83
Miscellaneous	795.00	1,001.00	990.25	859.50	398.00	946.00	4,989.75
Total Other Production Expenses	349,888.52	502,810.91	523,187.92	562,956.40	591,177.98	589,262.43	3,119,284.16
Total Production Expenses as per Licensee	4,818,167.23	5,728,253.99	5,618,260.20	5,246,287.72	5,560,498.03	5,477,311.34	32,448,778.51
Deduct—Water For Power	82,500.00	99,000.00	99,000.00	99,000.00	99,000.00	99,000.00	577,500.00
Total Production Expenses as Adjusted	$4,735,667.23	$5,629,253.99	$5,519,260.20	$5,147,287.72	$5,461,498.03	$5,378,311.34	$31,871,278.51

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Schedule No. 4.

COMPUTATION OF RATE OF RETURN FOR THE PERIOD
MARCH 2, 1941 TO DECEMBER 31, 1946, INCLUSIVE

Period	Investment			Working Capital		Return			
	Average Plant Investment (Sch. No. 4-A)	Average Reserve for Depreciation (Sch. No. 4-B)	Average Net Investment	Average Materials and Supplies (Sch. No. 4-C)	Operating Expenses (Sch. No. 4-D)	Total	Base	Operating Income (Sch. No. 3)	Rate (%)
3/2/1941 to 12/31/1941	$ 46,685,980.35	$10,845,308.44	$ 35,840,671.91	$127,715.45	$ 133,169.38	$ 260,884.83	$ 36,101,556.74	$ 2,480,131.61	6.87a
Year 1942	46,921,668.43	11,422,933.39	35,498,735.04	133,346.99	185,368.82	318,715.81	35,817,450.85	2,600,032.64	7.26
1943	47,274,031.26	12,135,434.06	35,138,597.20	131,341.51	194,382.24	325,723.75	35,464,320.95	2,298,684.44	6.48
1944	47,401,035.30	12,803,991.74	34,597,043.56	130,584.98	197,981.92	328,566.90	34,925,610.46	1,952,641.25	5.59
1945	47,188,585.47	13,432,505.46	33,756,080.01	125,499.25	195,210.35	320,709.60	34,076,789.61	2,027,324.21	5.95
1946	47,020,955.96	14,062,617.91	32,958,338.05	125,755.56	202,725.67	328,481.23	33,286,819.28	2,689,387.25	8.08
3/2/1941 to 12/31/1946 Aggregate	282,492,256.77	74,702,791.00	207,789,465.77	774,243.74	1,108,838.38	1,883,082.12	209,672,547.89	14,048,201.40	
Average	$ 47,082,042.79	$12,450,465.17	$ 34,631,577.62	$129,040.62	$ 184,806.40	$ 313,847.02	$ 34,945,424.64		

a For ten (10) months. On an annual basis the rate would be approximately 8.22%.

472 **Schedule No. 5**

COMPUTATION OF SPECIFIED RETURN WITH AMOUNTS TO BE CREDITED TO ACCOUNT 258.1, AMORTIZATION RESERVE—FEDERAL FOR THE PERIOD, MARCH 2, 1941 TO DECEMBER 31, 1946, INCLUSIVE

Period	Base (From Sch. No. 4)	Operating Income (From Sch. No. 3)	Specified Return (6%)	Excess Income Over Specified Return Total	Credit to Account No. 258.1
Mar. 2, 1941 to Dec. 31, 1941	$36,101,556.74	$2,480,131.61	$1,805,077.84	$675,053.77	$337,526.89
Year 1942	35,817,450.85	2,600,032.64	2,149,047.05	450,985.59	225,492.80
1943	35,464,320.95	2,298,684.44	2,127,859.26	170,825.18	85,412.59
1944	34,925,610.46	1,952,641.25	2,095,536.63	(142,895.38)	—o—
1945	34,076,789.61	2,027,324.21	2,044,607.38	(17,283.17)	—o—
1946	33,286,819.28	2,689,387.25	1,997,209.16	692,178.09	346,089.05
Mar. 2, 1941 to Dec. 31, 1946					$994,521.33

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2038 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper and Leland Olds.

March 15, 1949

Project No. 16

In the Matter of

THE NIAGARA FALLS POWER COMPANY

Order to Show Cause, Fixing Date of Hearing and Rescinding Previous Order.

By order dated March 16, 1948, the Commission directed that a copy of the Commission's staff report on operations of The Niagara Falls Power Company, licensee for Project No. 16, for the period March 2, 1921, to December 31, 1945, inclusive, be served on the licensee. The order also provided that the licensee should show cause, among other things, why the Commission should not find, determine and direct that surplus earnings from Project No. 16 for the period March 2, 1941, to December 31, 1945, inclusive, in the total amount of $1,699,046.79, should not be established and maintained by the licensee in an amortization reserve pursuant to Section 10(d) of the Federal Power Act.

On July 15, 1948, the licensee filed its answer to the order to show cause, including exceptions to the aforesaid Commission's staff report. Thereafter the Commission's staff re-examined licensee's books and held conferences with representatives of the licensee and numerous adjustments were made by the Commission's staff in its original report. At a conference on February 11, 1949, it was mutually agreed between representatives of the licensee and the Commission's staff that the staff would submit a revised report expanding the show cause proceeding to include the calendar year 1946, and containing the adjustments agreed upon for

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the period March 2, 1921, to December 31, 1945, inclusive. It was also understood that the licensee would be prepared to proceed with a hearing immediately after the filing of a revised answer by the licensee respecting matters upon which they were unable to agree.

A revised report entitled "Report on Operations from March 2, 1921, (Effective Date of License) to December 31, 1946, Inclusive, Project No. 16, The Niagara Falls Power Company," was submitted by the Commission's staff under date of February 23, 1949, and should be served upon the licensee as a substitute for the prior report.

On February 24, 1948, the licensee filed an application for amendment of Article 11 of the license concerning the establishment and maintenance of amortization reserves under Section 10(d) of the Act. By its order dated June 22, 1948, the Commission consolidated the proceedings concerning the application for amendment of Article 11 of the license and the show cause proceeding for the purpose of the public hearing respecting the matters involved and the issues presented in those proceedings.

The Commission *finds:*

2039 (1) Rescission of the aforesaid show cause order dated March 16, 1948, is appropriate as hereinafter provided.

(2) It is necessary and desirable in the public interest that a hearing be held respecting the matters involved and the issues presented by the show cause proceeding hereunder, and the application for amendment of Article 11 of the license for Project No. 16.

The Commission *orders:*

(A) The order to show cause dated March 16, 1948, referred to above is hereby rescinded.

(B) The revised staff report dated February 23, 1949, referred to above is made a part hereof by reference and the Secretary shall serve upon the licensee a copy of such report concurrently with service of this order.

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(C) The Niagara Falls Power Company, licensee for Project No. 16, shall show cause, under oath, if any there be, within thirty days from the date of service of this order, why the Commission should not find, determine, and direct that:

(a) Surplus earnings of the licensee for Project No. 16 for the period from March 2, 1941, to December 31, 1946, inclusive, in the total amount of $994,521.33, be set aside in an amortization reserve, pursuant to Section 10(d) of the Act, and accounted for in Account No. 258.1, Amortization Reserve-Federal, as provided in the Uniform System of Accounts prescribed for Public Utilities and Licensees under the Act; and

(b) Surplus earnings during the period from January 1, 1947, to December 31, 1948, inclusive, and concurrently for each year of the license period thereafter, be set aside each year by the licensee in the manner provided in the revised staff report dated February 23, 1949, referred to above, and as required by Section 10(d) of the Act;

(D) An answer by the licensee to this order, including the statements and recommendations in the revised staff report dated February 23, 1949, shall be made and filed in accordance with paragraph (c) of section 1.9 of the Commission's Rules of Practice and Procedure.

(E) Nothing herein contained shall be construed as affecting the accounting for earnings, if any, resulting from the so-called "emergency diversion" authorized in Amendments 4, 5, and 6 of the license, as modified by the order adopted January 4, 1949.

2040 (F) A public hearing be held respecting the matters involved and the issues presented in a consolidated proceeding embracing the application for amendment of Article 11 of the license and the show cause proceeding, commencing on May 3, 1949, at 9:45 a.m., (EST) in the Commission's Hearing Room, Hurley-Wright Building, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: March 15, 1949

2043 Filed April 14, 1949

BEFORE THE FEDERAL POWER COMMISSION

Project No. 16

In the Matter of THE NIAGARA FALLS POWER COMPANY

Licensee's Answer to Order to Show Cause Dated March 15, 1949, and to the Staff's (Revised) Report on Operations From March 2, 1921 (Effective Date of License) to December 31, 1946, Inclusive, Dated February 23, 1949 Including Licensee's Motion Under Rule 1.11(c)

The Niagara Falls Power Company (hereinafter called the "Licensee"), for its Answer to the Order to Show Cause dated March 15, 1949 in the above-entitled proceeding, and to the statements and recommendations in the Revised Staff Report dated February 23, 1949, entitled "Report of Operations from March 2, 1921, to December 31, 1946", alleges and shows to the Commission, upon information and belief, as follows:

INTRODUCTORY STATEMENT.

The Niagara Falls Power Company, Licensee of Project No. 16, is the holder of the first license issued by the Federal Power Commission, the date of its issuance being March 2, 1921.

* * * * * * * * * * *

2049 THE PROCEEDINGS FOR DETERMINATION OF AMORTIZATION RESERVE LIABILITY

Reference has been made above to the commencement by the Commission of proceedings for determination of amortization reserve liability of Licensee by service of an Order to Show Cause dated March 16, 1948 and Staff Report dated March 10, 1948.

On March 15, 1949 the Commission issued its "Order to Show Cause Fixing Date of Hearing and Rescinding Previous Order". This order rescinded the Order to Show

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Cause dated March 16, 1948 referred to above, incorporated as a part thereof the Revised Staff Report of February 23, 1949, and directed the Licensee to show cause within thirty days of the date of service of the order why, as respects the determination of amortization reserve liability, if any, of Licensee, the Commission should not find, determine and direct that:

"(a) Surplus earnings of the licensee for Project No. 16 for the period from March 2, 1941, to December 31, 1946, inclusive, in the total amount of $994,521.33, be set aside in an amortization reserve, pursuant to Section 10(d) of the Act, and accounted for in Account No. 258.1, Amortization Reserve-Federal, as provided in the Uniform System of Accounts prescribed for Public Utilities and Licensees under the Act; and

"(b) Surplus earnings during the period from January 1, 1947, to December 31, 1948, inclusive, and concurrently for each year of the license period thereafter, be set aside each year by the licensee in the manner provided in the revised staff report dated February 23, 1949, referred to above, and as required by Section 10(d) of the Act;"

and directed that a public hearing should be held on the matters involved and issues presented in a consolidated proceeding embracing the application for amend-
2050 ment of Article 11 of the License and the show cause proceeding, to commence on May 3, 1949.

This Answer is directed to the new Order to Show Cause dated March 15, 1949 and the Revised Staff Report dated February 23, 1949.

• • • • • • • • • • •

2051 LICENSEE'S ANSWER TO ORDER TO SHOW CAUSE.

Licensee makes its Answer to the Order to Show Cause dated March 15, 1949 and presents its Exceptions to the Revised Staff Report dated February 23, 1949, as follows:

I. Licensee excepts to and protests against the proposed

findings, determinations and directions set forth in Clauses (a) and (b) of Paragraph (C) of the Order to Show Cause dated March 15, 1949, on the grounds that:

(a) The proposed determination of surplus earnings of Licensee for Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive, to be set aside and held in an amortization reserve, in total amount of $994,521.33, is incorrect and inconsistent with the facts, is prematurely made, and erroneous under and not in accordance with the applicable provisions of statute, the lawful terms of the License and rules of law; and any order adopting, approving or directing compliance with the said determination of surplus earnings to be set aside in amortization reserve, or directing the setting-aside of said amount in amortization reserve, as proposed in said Order to Show Cause, would be arbitrary, capricious, in excess of the statutory authority of the Commission and contrary to the rights, privi-
2052 leges and immunities of Licensee under the Constitution of the United States and particularly under the provisions of the Fifth Amendment thereto.

(b) Any determination of surplus earnings during the periods from January 1, 1947, to December 31, 1948, inclusive, and concurrently for each year of the license period thereafter, made in the manner provided and recommended in the Revised Staff Report, or any order approving, adopting, or directing compliance with such determination, or with such manner of determination, of surplus earnings of Licensee during periods from and after January 1, 1947, would be inconsistent with the facts, prematurely made, erroneous in respect of interpretation and application of the provisions of the Federal Power Act, the terms of the Project No. 16 License, and other applicable provisions of law, arbitrary and capricious, in excess of the statutory authority of the Commission, and violative of the legal rights of the Licensee under the Federal Power Act, the terms of the License contract, and applicable provisions of the Constitution of the United States, particularly of the Fifth Amendment thereof.

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ANSWER TO REVISED STAFF REPORT.

Licensee admits and accepts the allegations of the Revised Staff Report appearing under the heading "GENERAL", at pages 1 to 5, inclusive, of the Report; except that Licensee understands and therefore alleges that notwithstanding any statement contained on page 1 of the Report of contrary or inconsistent purport or effect, the purpose
of the Report is to determine the amount of earnings,
2053 if any, to be set aside in an amortization reserve pursuant to Section 10(d) of the Federal Power Act, and that any provisions of Article 11 of the License, as amended, whether or not inconsistent with the provisions of Section 10(d), are to be disregarded for the purposes of this proceeding.

Licensee excepts to various portions of the Revised Staff Report (which is hereinafter in these Exceptions referred to as the "Report") and to the accompanying Schedules and Exhibits, and to the Report in its entirety, as set forth in the following Exceptions:

* * * * * * * * * * *

2056 EXCEPTION No. 2.

(Report, pages 12-13, Schedule No. 3.*)

A. Staff's Recommendations:

Finding and determination of Net Operating Income of the Licensee in the respective amounts as stated at page 13 of the Report, or of Operating Income as Adjusted, as the same amounts are designated in Schedule No. 3, page 41, for the period from March 2, 1941 to December 31, 1941, and for each of the Years 1942 to 1946, both inclusive.

B. Exception:

Licensee excepts to such proposed finding and determination on the grounds that the computation of said amounts are based upon:

* Wherever in its Exceptions Licensee has directed exception to any Schedule accompanying the Staff Report or to any item or amount stated in such Schedule, the Licensee's Exception shall be deemed to apply to such Schedule as well as to related portions of the text of the Report.

(1) An arbitrary, erroneous and illegal inclusion in the items Electric Operating Revenues—Sales of Electric Energy To: Other Electric Utilities of the amounts of $31,100.00 [report presumably should use "$31,500"] for the ten months' period ended December 31, 1941, and of $37,800.00 for each of the Years 1942 to 1946, inclusive (Report, pages 15-16; Schedule No. 3; Exception No. 3, *infra*);

2057 (2) An arbitrary, erroneous and illegal exclusion from the items Production Expenses—Hydraulic of the amounts of $82,500 for the ten months' period ended December 31, 1941, and of $99,000 in each of the years 1942 to 1946, inclusive (Report, page 17; Schedule No. 3; Schedule No. 3-A, line: "Deduct—Water for Power"; Exception No. 4, *infra*).

The said inclusion and exclusion are in violation of the legal and constitutional rights of the Licensee under the License contract, the provisions of the Federal Power Act, and the Constitution of the United States, particularly the Fifth Amendment thereof.

C. Supporting Reasons:

Reference is hereby made to the argument under the heading "C. Supporting Reasons" in Exceptions Nos. 3 and 4, *infra*.

EXCEPTION No. 3.

(Report, pages 13-16, Schedules Nos. 3 and 3-A.)

A. Staff's Recommendation:

The Staff, in its discussion of "Production Expenses" on pages 13-16 of its Report, has disregarded the terms of a valid subsisting contract between the Licensee and Buffalo Niagara Electric Corporation with respect to the use by Licensee of certain rights in 262.6 cfs of water at a head of 100 feet formerly owned by the so-called "Pettebone-Cataract" interests and now owned by Buffalo Niagara Electric Corporation, and has made arbitrary

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adjustments to increase Operating Revenues Received from Other Electric Utilities, in manner as follows:

2058 "In view of the Commission's decision in respect to this claimed right, for the purposes of this report, the revenues received from other electric utilities have been increased by $31,100.00 [report presumably should use "$31,500"] for the ten-month period ended December 31, 1941, and by $37,800.00 for each of the years 1942 to 1945, inclusive, on the premise that except for the agreement relating to the alleged water right, Buffalo Niagara Electric Corporation would have paid for the 2,000 kw of energy received under the contract of May 1, 1925 at the same rate as it paid for other energy purchased from Licensee, which was at the rate of $26.80 per kw per year." (Report, pages 15-16.)

B. Exception:

Licensee excepts to the recommended adjustment on the following grounds:

(1) The right, formerly owned by Pettebone-Cataract Paper Company and Cataract City Milling Company, and now owned by Buffalo Niagara Electric Corporation and by it leased to Licensee, to take from the Canal Basin of Licensee and to use for power purposes at a head of 100 feet 262.6 cfs of water (hereinafter in these Exceptions referred to as the "Pettebone-Cataract water rights")—is a right valid and subsisting under the laws of the State of New York and of the United States, which right has not been adjudged invalid by any court of said State or of the United States.

(2) The Contract between Buffalo Niagara Electric Corporation (as successor to Niagara, Lockport and Ontario Power Company) and the Licensee, dated May 1,
2059 1925 (with amendments not here material), is a valid and subsisting contract under the laws of the United States; and the proposed adjustments of Revenues

Received from Other Electric Utilities, with respect to the payments actually received by the Licensee under the said Contract during the periods, are arbitrary, contrary to fact, and erroneous in law, and are violative of Licensee's rights under said Contract, the License contract, the provisions of the Federal Power Act, and the Constitution of the United States, particularly the Fifth Amendment thereof.

C. Supporting Reasons:

The Licensee's position with respect to these water rights, the payments made by Niagara, Lockport and Ontario Power Company to the then owners for acquisition of said rights, and the legal, operating and fiscal bases of the contract between the Licensee and Niagara, Lockport and Ontario Power Company, dated May 1, 1925, whereby Niagara Lockport leased the said water rights to the Licensee, have been fully set forth in the proceedings had upon Licensee's application for amendment of Article 13 of the original Project No. 16 License, which was filed with the Commission on February 17, 1947, and which was the subject of the Commission's Opinion No. 159 and Order entered November 17, 1947.

That proceeding was considered and determined upon an agreed state of facts. The Commission's hearing order therein, dated April 8, 1947, contained the finding that

"(7) The facts necessary to determine the validity of the water rights in question are presented in sufficient detail in the application filed February 17, 1947, together with the exhibits attached thereto, as supplemented March 20, 1947."

2060 The facts stated in the application were further supplemented by stipulation of counsel after argument (See Transcript of Argument, June 18, 1947, pages 15, 40; Stipulation filed on or about July 28, 1947).

Licensee incorporates herein by reference the facts stated in the application as supplemented and in Applicant's Ex-

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hibits listed in the stipulation in the 1947 proceeding, referred to above.

The Commission will recall that the Licensee has expressly reserved its rights to contest the legal conclusions contained in Opinion No. 159 of the Commission. By letter to the Commission, dated December 19, 1947, the Licensee advised the Commission as follows:

"The Niagara Falls Power Company advises you that, while it does not agree with the reasoning or conclusions contained in Opinion No. 159, no application for rehearing will be made from the order denying the application for amendment of license and that the application will not be renewed at this time.

"It is the Company's position that its failure to apply for a rehearing or to renew the application is without prejudice to its right to contest the legal conclusions contained in Opinion No. 159, should the matter arise in concrete form in any subsequent proceeding."

Under Section 6 of the Act the License may be altered only upon mutual consent. In its application the Licensee had merely proposed to the Commission that it agree to the suggested alteration of the License. The legal effect of the Commission's action was a refusal to agree. The failure of either party to reach a mutual agreement for an alteration of the license contract does not, under these circumstances, constitute a reviewable determination. The Order of November 17, 1947 denying Licensee's ap-
2061 plication for amendment of the Project No. 16 License to eliminate therefrom the reference "to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company" was not by its terms any direction, determination or declaration that the Pettebone-Cataract water rights were legally invalid. The order did not so declare. It follows that the refusal of the Commission to agree to the proposed amendment application was of no substantial interest to the Licensee, since the deletion

of the reference to the rights in question would confer no benefit or advantage to the Licensee, but would serve only to remove a possible cloud upon the title of the United States in the event of recapture.

The right or privilege of review is extended to Licensee under Section 313 (a) of the Federal Power Act. That Section provides for review only on the part of a person "aggrieved by an order issued by the Commission". Since the Licensee was not substantially affected by the failure to agree to amendment, there was no substantial basis or occasion for judicial review of the Commission's order by Licensee. The only matters objectionable to the Licensee were statements made in the Commission's Opinion. It is not consonant with established principles of judicial review of administrative action that parties should review an *opinion*. The time and occasion for review will arise only if the questionable contentions are applied in some subsequent order adversely affecting or aggrieving this Licensee or another in some substantial and material way.

As a matter of law, therefore, the opinion expressed by the Commission in its Opinion No. 159 is not legally binding upon the Licensee, nor was the order entered in connection therewith a final and reviewable order under the provisions of the Federal Power Act.

2062 Licensee again points out that the rights acquired by Niagara Lockport from the Pettebone-Cataract interests to divert and use specified amounts of water from the Hydraulic Canal of Licensee were, and now are, valid and subsisting rights of property under the laws of the State of New York, properly subject to, and a proper subject for, the payment of valuable money consideration in the event of a transfer of ownership or lease thereof. Licensee further points out that the Pettebone-Cataract water rights have a status under Federal law similar to the status of the water rights of International Paper Company, which were the subject of decision by the Supreme Court of the United States in *International Paper Company* v. *United*

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States, 282 U. S. 399, and which will be further discussed in the next following Exception, to which reference is hereby made.

EXCEPTION No. 4.

(Report, pages 16-17; Schedules Nos. 3 and 3-A.)

A. Staff's Recommendation:

Staff has further disallowed from Licensee's Production Expenses payments made by Licensee to International Paper Company for the grant and release to Licensee of water rights vested in International Paper Company.

On page 17 of the Report the following statement appears:

"The alleged right of the International Paper Company to take water from the works of The Niagara Falls Power Company is founded on the same premise that Licensee argued that the Pettebone Cataract interests had in respect to the 262.6 cfs of water which was the subject of
2063 Opinion No. 159 entered by the Commission on November 17, 1947. Therefore, for the purposes of this report, the payment of $82,500 in the ten months ending December 31, 1941, and the payments of $99,000 in each of the years 1942 to 1946, inclusive, to the International Paper Company for 'water for power' have been eliminated from Licensee's claimed production expenses."

B. Exceptions:

Licensee excepts to such proposed disallowance or elimination.

The right of International Paper Company has been held by the Supreme Court of the United States to be an appropriate subject for just compensation paid by the United States for a temporary taking in an exercise of the war power (*International Paper Co.* v. *U. S.,* 282 U. S. 399), and thus has been adjudged to be a valid and subsisting

right under the laws of the United States, even as against high constitutional powers of the National Government itself.

Contract payments based upon such right are legally valid, and have been and are made for good and valuable consideration.

Disallowance or elimination of such payments from Licensee's Production Expenses for the periods is arbitrary, contrary to fact, illegal, and violative of Licensee's rights under its contracts with International Paper Company, the License contract, the provisions of the Federal Power Act, and the Constitution of the United States, particularly the Fifth Amendment thereto.

C. Supporting Reasons, and Authorities:

The right of International Paper Company, here questioned by the Staff, was held by the Supreme Court of the United States to be:

2064 "a right that by the law of New York was a corporeal hereditament and real estate."
(*International Paper Company* v. *United States,* 282 U. S. 399 at page 405).

The decision of the Supreme Court of the United States in the *International Paper Company* case (282 U. S. 399) was determinative, not only of the status of the right of diversion of International Paper Company under New York law, but of the status of such right under Federal law and as against the United States itself.

While the *International Paper Company* case is well known to the Staff of the Commission, and was the subject of extensive argument in the 1947 license amendment proceeding above referred to in the preceding Exception No. 3, it is appropriate here to consider in further detail the essential issues involved and determined in that case.

The Staff Report at page 16 summarizes the provisions of the contracts existing between International Paper Com-

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pany and The Niagara Falls Power Company (predecessor constituent corporation) on December 28, 1917. On that date

"the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second"

of water from the intake canal of the predecessor Company.*

2065 On December 28, 1917 the Secretary of War requisitioned from the Power Company

"the total quantity and output of the electrical power which is capable of being produced * * * by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith."

As appears from the opinion at 282 U. S. pages 405 and 406, this requisition was applied as including the water theretofore diverted by International Paper Company and used in its mill. After the conclusion of the War, International Paper Company sued in the Court of Claims for compensation for the taking of its water rights during the period of the War emergency, which had necessarily caused a suspension of operation of its paper mill at Niagara Falls during the effective period of the requisition.

The Court of Claims rendered judgment against International Paper Company and in favor of the United States with opinion recorded at 68 Ct. Cls. 414. The *ratio decidendi* of the Court of Claims decision involved a holding in effect that, since the diversion by the Power Company and the Paper Company of water from Niagara River was the subject of a revocable license from the Federal Government, the Paper Company, as lessee thereof, had no right of diversion and use of the water which could be valid or enforceable against the Federal Government (See the Opin-

* 282 U. S. 405. The intake canal there involved was the intake canal of the Adams Station of the Licensee.

ion of the Court of Claims, 68 Ct. Cls. at pages 68-69, 70-71, and the Petition and Transcript of Record in 282 U. S. 399).

It is clear from examination of the record and briefs in the *International Paper Company* case, to which the Commission is respectfully referred, that the effect
2066 of the paramount Federal power over navigable international boundary waters was vigorously litigated throughout the *International Paper* case. Thus, in the Objections, Request for Findings of Fact, and Brief and Argument on behalf of the United States in the Court of Claims, it was urged that

"Plaintiff's action, if any, grew out of, and is dependent upon, a stipulation of a treaty between the United States and Great Britain, ratified and exchanged at Washington, May 5, 1910,"

(page 341), and

"The water and its consequent power is not 'private property' within the meaning of the [Fifth] Amendment."

(page 342)

The proposition that the Federal powers over navigable waters under the commerce clause and over boundary waters under the International Boundary Waters Treaty of 1909 were paramount and over-riding of all rights under private title or State grant was argued at length in that brief at pages 344-383.

The argument of the Claimant in reply to these contentions was presented in Claimant's Reply Brief at pages 412-428.

As we have pointed out above, the argument of paramount and exclusive Federal powers was effective to obtain a dismissal of the claim by the Court of Claims. However, upon petition, the Supreme Court of the United States granted certiorari (281 U. S. 710) and, after argument on the merits, reversed the judgment of the Court of Claims and held that International Paper Company was entitled

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to compensation for the taking of its water rights for the period of the requisition.

2067 The question of the effect of paramount Federal powers was squarely presented in the review by the Supreme Court. In the Paper Company's Brief in Support of Petition for Certiorari a principal point of the Petitioner's argument was that:

"Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring to the Federal Government proprietary rights in the waters of the Niagara River acquired under the laws of the State of New York."

This point was renewed as Petitioner's Point V in its brief on the merits. (See 282 U. S. 401.)

The Solicitor General, in Point III of the brief for the United States asked that:

"The interference with Petitioner's property was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable." (282 U. S. 404.)

In its Reply Brief, the Petitioner replied that:

"The taking of Petitioner's water was, not a mere regulation, but was a substantial deprivation of property, for which compensation must be paid."

On these arguments the Supreme Court reversed the judgment of the Court of Claims and held that the Paper Company was entitled to compensation.

The Court stated in its opinion:

At pages 404-405:

"The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far

2068 as the law of New York could make it owner of land

and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second, a right that by the law of New York was a corporeal hereditament and real estate."

At page 407:

"It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

At page 408:

"here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal."

There is appended to this Answer, as Appendix A hereto, the complete text of the Opinion of the Supreme Court of the United States as it appears at 282 U. S. 404-408. The attention of the Commission is directed particularly to the paragraphs at pages 404-405, 407 and 408, from which we have quoted above.

2069 The Opinion clearly holds that the Paper Company, as lessee of the Power Company, Licensee's predecessor, possessed water rights valid and subsisting as against the Federal Government itself, for the taking of which, even under the war power, compensation must be made. This is conclusively determinative of the existence

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and validity of these water rights, and is conclusive against the contentions upon which the Staff has based the related adjustments and eliminations proposed in Schedule No. 3-A of the Report.

There is appended to this Answer as Appendix B hereto a further analysis of the conveyances and agreements relating to the water right of International Paper Company, which is incorporated in this Exception No. 4 by reference and made a part hereof.

While the right of International Paper Company to draw water from the Licensee's intake works was conditionally granted and released to Licensee under an Agreement of March 1, 1919, modified in certain respects by an Agreement of August 1, 1937, International Paper Company under these Agreements has the right and power upon certain contingencies to annul the grant and release and to restore and re-establish to itself the self-same rights of diversion which were the subject of the decision of the Supreme Court of the United States.

The amounts, proposed by the Staff to be eliminated from Licensee's Production Expenses—Hydraulic, are clearly, on the face of the pertinent facts, payments made for release of valid and subsisting water rights sustained by the Supreme Court of the United States, and these payments should not be eliminated from Licensee's claimed production expenses during this period.

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2073 EXCEPTION No. 6

(Report, pages 27-28; Schedules Nos. 4 and 4-B.)

A. Staff's Recommendation:

Finding and determination of the rate of return of Licensee from normal operations, by years, for the period from March 2, 1941, to December 31, 1946, inclusive, as shown in Schedule No. 4.

and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second, a right that by the law of New York was a corporeal hereditament and real estate."

At page 407:

"It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

At page 408:

"here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal."

There is appended to this Answer, as Appendix A hereto, the complete text of the Opinion of the Supreme Court of the United States as it appears at 282 U. S. 404-408. The attention of the Commission is directed particularly to the paragraphs at pages 404-405, 407 and 408, from which we have quoted above.

2069 The Opinion clearly holds that the Paper Company, as lessee of the Power Company, Licensee's predecessor, possessed water rights valid and subsisting as against the Federal Government itself, for the taking of which, even under the war power, compensation must be made. This is conclusively determinative of the existence

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and validity of these water rights, and is conclusive against the contentions upon which the Staff has based the related adjustments and eliminations proposed in Schedule No. 3-A of the Report.

There is appended to this Answer as Appendix B hereto a further analysis of the conveyances and agreements relating to the water right of International Paper Company, which is incorporated in this Exception No. 4 by reference and made a part hereof.

While the right of International Paper Company to draw water from the Licensee's intake works was conditionally granted and released to Licensee under an Agreement of March 1, 1919, modified in certain respects by an Agreement of August 1, 1937, International Paper Company under these Agreements has the right and power upon certain contingencies to annul the grant and release and to restore and re-establish to itself the self-same rights of diversion which were the subject of the decision of the Supreme Court of the United States.

The amounts, proposed by the Staff to be eliminated from Licensee's Production Expenses—Hydraulic, are clearly, on the face of the pertinent facts, payments made for release of valid and subsisting water rights sustained by the Supreme Court of the United States, and these payments should not be eliminated from Licensee's claimed production expenses during this period.

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2073 EXCEPTION No. 6

(Report, pages 27-28; Schedules Nos. 4 and 4-B.)

A. Staff's Recommendation:

Finding and determination of the rate of return of Licensee from normal operations, by years, for the period from March 2, 1941, to December 31, 1946, inclusive, as shown in Schedule No. 4.

B. Exception:

Licensee excepts to such recommended finding and determination on the following grounds:

(1) That the rates of return recommended for determination are based upon and computed from the erroneous and incorrect or incomplete figures with respect to which specific exceptions have been made in Exceptions Nos. 2, 3, 4, and 5, *supra;*

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2075 EXCEPTION No. 7

(Report, pages 29-30; Schedule No. 5.)

A. Staff's Recommendation:

The determination of Excess Income Over Specified Return for the period from March 2, 1941 to December 31, 1941 and for the years 1942, 1943, 1944, 1945 and 1946 in the respective amounts shown in the column headed "Excess Income Over Specified Return—Total" in Schedule No. 5 of the Report, and the determination of amounts to be credited to Account No. 258.1, as shown in Schedule No. 5 in the column headed "Excess Income Over Specified Return—Credit to Account No. 258.1" and in the table appearing on page 30 of the Report; and the transfer of the
2076 sum of $994,521.33, representing the aggregate of said amounts to be credited to Account No. 258.1, from Account No. 271, Earned Surplus to Account No. 258.1, Amortization Reserve—Federal, as recommended at page 30 of the Report.

B. Exceptions:

Licensee excepts to the determination of such amounts, and to the recommended transfer, on the ground that such amounts are incorrect and erroneous, and computed under and based upon erroneous assumptions of fact and law, in the following respects:

a. The use of an improper Base for each of the periods March 2-December 31, 1941 and Years 1942, 1943, 1944,

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1945 and 1946, for the calculation of a specified return (Exception No. 6);

b. The arbitrary inclusion of certain amounts in Operating Revenues (Exception No. 3);

c. The arbitrary exclusion of certain amounts from Operating Revenue Deductions (Exception No. 4);

d. Failure to include in Operating Revenue Deductions the effect of tax adjustments applicable to certain of the periods (Exception No. 5);

e. The use of erroneous amounts of Operating Income, stated in Schedule No. 5, to compute amounts of return, such error deriving from the errors set forth in the preceding paragraphs b, c and d;

f. The use of erroneous amounts of Specified Return, as calculated upon erroneous and improper amounts of Base (paragraph a above);

2077 g. The determination of erroneous amounts of Excess Income Over Specified Return;

h. The failure (as disclosed by treatment of the years 1944 and 1945 in Schedule No. 5) to apply and give effect to a cumulative method of computation for determination of the aggregate amount of earnings in excess of the specified rate of return and for the determination of amounts to be credited to amortization reserve (Exception No. 8);

i. The determination of erroneous amounts to be credited to amortization reserve (Account No. 258.1)—(these being one-half of the respective alleged excess amounts of Excess Income Over Specified Return as stated in Schedule No. 5) —through failure to give effect to deficiencies of earnings below the specified rate of return in certain of the years (Exceptions Nos. 8 and 9);

j. The apparent attempt to determine finally credits to amortization reserve for the respective years and periods, and a balance therein as of December 31, 1946, without regard to the results of operations for the year 1947, for which data are now available; and the failure otherwise to qualify the recommended credits and balance as tentative

computations, subject to adjustment on a cumulative basis throughout the remainder of the license period (Exceptions Nos. 8, 9 and 10, *infra*).

A final determination embodying or premised upon any of the errors specified in the foregoing paragraphs
2078 "a" to "i" inclusive would be in excess of the authority conferred upon the Commission by statute and would be in violation of the legal and Constitutional rights of the Licensee.

C. Supporting Reasons:

Reference is made to the arguments of Licensee under the respective Exceptions enumerated in the preceding subdivision B of this Exception.

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2083 EXCEPTION No. 11

(Schedules Nos. 3, 4 and 5.)

A. Staff's Recommendation:

Approval and adoption of Schedules Nos. 3, 4 and 5 of the Revised Staff Report, or of findings or determinations based thereon.

B. Exception:

In addition to the Exceptions hereinbefore stated, directed to the said Schedules Nos. 3, 4 and 5 and to any recommended findings or determinations based thereon, Licensee further excepts specifically to the said Schedules and the items and amounts set forth therein, to the extent that said Schedules vary in content and in statement of corresponding items and amounts from Licensee's Revised Schedules Nos. 3 and 4.

Licensee incorporates as a part of this Exception
2084 and submits annexed to this Answer and Exceptions its Revised Schedules Nos. 3 and 4.

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Licensee's Schedule No. 3, entitled: "The Niagara Falls Power Company, Results of Operations—Project No. 16 For the Period March 2, 1941 to December 31, 1941 and for the Calendar Years 1942 to 1946, Inclusive," sets out in its first line Project No. 16 Operating Income as shown in Schedule No. 3 of the Revised Staff Report, and shows in the three following items for each year the adjustments resulting from (1) application of the provisions of the Deed and Agreement of May 1, 1925, as amended, with respect to the so-called Pettebone-Cataract water rights (Exception No. 3, *supra*), (2) the inclusion as production expenses of the payments made to International Paper Company in respect of water rights formerly granted and leased to that Company (Exception No. 4, *supra*), and (3) adjustments of Federal income tax resulting from allocation and distribution of accruals of New York State water charges (Exception No. 5, *supra*). The computation of these last-mentioned adjustments is shown on Licensee's Schedule No. 3-T.

* * * * * * * * * * *

2090 LICENSEE'S PRAYER FOR RELIEF

WHEREFORE, Licensee requests:

* * * * * * * * * * *

(b) That the Commission make an appropriate finding that the Revised Staff Report on Operations from March 2, 1921 (Effective Date of License) to March 31, 1946, Inclusive, dated February 23, 1949, be disapproved as factually incorrect and as contrary to the applicable provisions of law and of the Constitution of the United States, particularly the Fifth Amendment thereof;

(c) That the proceeding under the Commission's Order to Show Cause dated March 15, 1949, be dismissed on the ground that no credit balance of amortization reserve has accumulated or exists as of December 31, 1946 under the

Project No. 16 License, and that Licensee is under no liability therefor;

2091 (d) That appropriate orders to such effect be issued by the Commission.

April 14, 1949.

Respectfully submitted,

THE NIAGARA FALLS POWER COMPANY,
Licensee of Project No. 16,
Niagara Falls, New York,
By A. T. O'NEILL,
Its President.

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Of Counsel.

[Verified by A. T. O'Neill, President of The Niagara Falls Power Company, April 14, 1949.]

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2093 APPENDIX A

OPINION

OF THE SUPREME COURT OF THE UNITED STATES IN INTERNATIONAL PAPER COMPANY v. UNITED STATES

282 U. S. 399 at 404-408
Decided January 19, 1931

* * * * * * * * * * *

2098 APPENDIX B

CONVEYANCES AND AGREEMENTS RELATING TO THE WATER RIGHT OF INTERNATIONAL PAPER COMPANY

THE BASIC AGREEMENTS

The contractual relations between the predecessors of International Paper Company and the Licensee commenced with an Agreement of Lease dated September 1, 1891 whereby The Niagara Falls Power Company (constituent) leased to The Soo Paper Company (predecessor of Niagara Falls Paper Company and of International Paper Company) land and a water right substantially identical with those conveyed by the Deed of March 7, 1896, referred to in the next following paragraph.

A Deed of March 7, 1896, made by the constituent Power Company to Niagara Falls Paper Company, provided for conveyance of the mill site of the Paper Company, containing 11.75 acres of land and land under water, more or less,

"together with 3000 Horse Power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging;"

these being the same premises theretofore leased by the Power Company to the Paper Company under the lease dated September 1, 1891. Further provisions of the deed provided that the Power Company should provide the right

to take water, either from the Niagara River at a point opposite the granted premises or, at the option of the Paper Company, from the intake canal of the Power Company, in an amount equivalent to 300 cubic feet of
2099 water per second ("cfs") at a fall of 120 feet; such water to be discharged through discharge tunnels of the Power Company. Such water right

"was made subject to the payment of an annual rental of Twenty-four thousand ($24,000) Dollars payable by the Paper Company to the Power Company in perpetuity."

An Agreement, also dated March 7, 1896, provided a lease of additional water and water power rights sufficient to develop 2900 hp for a period of ten years after October 1, 1896, and renewable at the option of the Paper Company for ten-year terms after January 1, 1936 (which was then the termination date of the duration of the corporate charter of the Power Company). Additional power in blocks of 500 hp might be taken from the Paper Company from time to time during the term or extended term of the agreement up to the full capacity of the discharge tunnel leading from the Paper Company's wheel-pit to the Power Company's main tunnel. Under this agreement $29,000 annually was prescribed as rental for the 2900 hp and $10 per horsepower per annum for the additional blocks of 500 hp each. Under letter dated November 30, 1896, the Paper Company increased its takings of water to an amount equivalent to 7200 hp.

On January 31, 1898, Niagara Falls Paper Company conveyed to International Paper Company the land and water rights acquired from the Power Company under the March 7, 1896 Deed, including the right in perpetuity to use water and water power to the extent of 3000 hp, as therein provided. By Agreement made June 1, 1898, between the Power Company and International Paper Company, the rights as to additional water and water power under the Agreement of March 7, 1896 were confirmed to

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International Paper Company and were extended in duration by terms of ten years each "so long as the cor-
2100 porate existence of the Niagara (Power) Company shall be renewed and continued." At the time of the requisition by the Secretary of War in the winter of 1917-18, the Paper Company was taking and using from the Power Company's intake canal an amount of water sufficient to develop 8156.25 hp, amounting to approximately 730 cfs of water.

This was the situation and these were the rights which were the subject of adjudication by the Supreme Court of the United States in the *International Paper Company* case.

AGREEMENTS SUBSEQUENT TO 1918.

A primary purpose of the consolidation of the American power companies at Niagara Falls to form the present Licensee, effective October 31, 1918, was to permit the use of the waters theretofore diverted by the constituent company through the Adams Station by the consolidated Company (Licensee) in the Schoellkopf Station at an additional 75 feet of head. Such more efficient utilization of the 730 cfs diverted by International Paper Company could not be accomplished unless some arrangements were made to transfer this water physically to the hydraulic works of the Schoellkopf Station. This, it may be inferred, was the motivating force of the 1919 Agreement.

By the "1919 Agreement", made between Licensee and International Paper Company under date of March 1, 1919, the Power Company granted to the Paper Company

"such right by way of lease and easement in gross in and to the lands, water rights, works and machinery of 'Lessor', so far as the same are devoted to the development of hydraulic power and its transformation into electric energy, as may be necessary for supplying the 'Lessee,' its
2101 successors and assigns, at the generating station of 'Lessor' with firm power, as hereinafter specified,"

in the amount of 8750 electrical horsepower ("ehp"); and Paper Company conditionally granted and released to the Power Company all its rights under the prior deeds and agreements to draw from the Niagara River or from the Power Company's intake canal water for use in the development of power. It was provided, as the condition of the grant and release, that

"In case at any time, by reason of foreclosure of existing mortgages or insolvency, or governmental interference, or any other cause whatever, it shall become impossible for LESSOR, or LESSOR shall fail continuously for a period of ninety (90) days to carry out this agreement and to deliver the 'firm power' specified in Article II hereof, then, at the option of LESSEE, evidenced by written notice given forthwith, all original rights of LESSEE in, to and under the aforesaid deed of March 7, 1896, and the aforesaid lease of March 7, 1896, and said agreement of June first, 1898, shall revive and continue in full force and effect to the same extent as if this conditional grant and release thereof had not been made."

The 1919 Agreement provided, as rental for generation of electric energy and as compensation for the transmission thereof to the Paper Company's plant, the rate of Twenty ($20.) Dollars per ehp per annum, or such other lawful rate as might be thereafter fixed, subject, however, to a credit against such amount

"as compensation to Lessee for the water rights granted, released and surrendered by Lessee to Lessor hereunder, a sum so that the net payment for the eight thousand seven hundred fifty (8,750) electrical Horse Power 'firm power' shall at all times equal the sum of Seventy-six thousand ($76,000.) Dollars per annum."

2102 It was specifically provided in the 1919 Agreement that either party might maintain an equitable action for specific enforcement of these terms (other than the terms of payment).

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The 1919 Agreement was in force at the time of the granting of the original Project No. 16 License of March 2, 1921, when it was provided, in Article 13 thereof, that

"Such taking over of the project shall also be subject * * * to the rights, if any, of International Paper Company".

In 1937 Licensee filed with the Public Service Commission of the State of New York a rate schedule or filed tariff, applicable to all sales of electric power to industrial customers, and Licensee and International Paper Company executed an agreement for supply of electric power in form prescribed by the rate schedule. Concurrently therewith, Licensee and the Paper Company entered into a further Agreement, dated August 1, 1937. This "1937 Agreement" amended the 1919 Agreement by terminating all of the provisions relating to the supply of electric energy by the Licensee to the Paper Company and modifying the provisions as to payments and credits due between the parties. Since the Paper Company would thereafter pay for electrical energy at the rates prescribed by the filed tariffs from time to time in effect, a formula was provided for computation of the annual use or rental value of the water released by the Paper Company to the Licensee under the 1919 Agreement. This formula arrives at the

"fair and reasonable annual use or rental value"

2103 of the block or water released by the Paper Company by multiplying the number of kilowatts equivalent to the 8750 horsepower provided in the 1919 Agreement by the "current market price per kilowatt per year from time to time of hydroelectric power supplied and taken within the City of Niagara Falls"

and by deducting therefrom the sum of $76,000, an amount equivalent to the annual payments being made by Paper Company to the Power Company pursuant to the 1919 Agreement. The amount computed under this formula for the ten months following March 1, 1941 was $82,500, and the

amounts for the years 1942-1945, inclusive, 1946 and 1947, were $99,000 annually.

The 1937 Agreement amended Articles VIII and IX of the 1919 Agreement, which related to the grant and release of the Paper Company's water rights, by providing that the grant and release of the water rights were conditioned upon the Licensee's continuing to divert and being entitled to divert water from the Niagara River for use in the development of power, and were also subject to termination in the election of the Paper Company in the event that the Licensee's right to divert or diversion should cease and the Licensee should be in default in making payments for the grant and release of the water rights as provided in the amended Agreement (Article VIII). It was provided, under the amended Article IX (c), that

"(c) If Lessor shall cease to divert and shall cease to be entitled to divert water from the Niagara River for use in the development of power, the grant and release of water rights contained in Article VIII hereof shall cease and determine, and if Lessor shall be in default for a pe-
2104 riod of more than thirty (30) days after written demand by Lessee in making the payments provided for in this Article IX said grant and release may, at the election of Lessee be terminated. Such election shall be exercised by notice in writing to Lessor and shall be without prejudice to Lessee's enforcement at law or in equity of any rights of Lessee arising out of such default prior to such termination. In case of said grant and release ceasing and determining as aforesaid or being terminated by Lessee as aforesaid, the mutual rights and obligations of the parties (exclusive of any such right of Lessee at law or in equity) from and after such termination shall be determined under and pursuant to the deed dated March 7, 1896, the lease of even date therewith and the renewal agreement dated June 1, 1898 referred to in the recitals hereto in and of themselves without subtraction from, addition to or modification of said deed, lease and renewal

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agreement by anything contained in this Agreement, and in all respects as if this Agreement had never been executed, delivered or complied with."

In other words, if the grant and release of the water rights should be terminated in the event that the Licensee should at any time cease its diversion for power purposes or cease to pay the rental required under the Agreements, then there would be restored with renewed and continuing force and effect the very same legal rights with respect to which the decision in *International Paper Company* v. *United States* was rendered.

Thus not only the legal situation which existed in 1918, but the legal situation lately and now existing between the Licensee and International Paper Company, is determined and controlled by the decision in *International Paper Company* v. *United States.*

Filed February 24, 1950.

2115

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision.

Project No. 16

In the Matter of

The Niagara Falls Power Company

UPON AN APPLICATION FOR AMENDMENT OF ARTICLE 11 OF THE LICENSE AND

UPON AN ORDER TO SHOW CAUSE WHY THE AMORTIZATION RESERVE REQUIRED BY THE LICENSE AND SECTION 10(d) OF THE FEDERAL POWER ACT SHOULD NOT BE ESTABLISHED AND MAINTAINED.

APPEARANCES.

For the Licensee

Randall J. Le Boeuf, Jr., Esq.
Lauman Martin, Esq.
Chauncey P. Williams, Jr., Esq.

For the Staff of the Commission

Willard W. Gatchell, Esq.
Joseph B. Hobbs, Esq.
Joan Moon, Esq.

PROCEDURAL RECORD.

Commission Order to Show Cause, fixing date of hearing and rescinding previous order (dated March 16, 1948) issued on March 15, 1949.

Commission Order consolidating proceedings for purpose of hearing, issued June 24, 1948.

Commission Order denying Motion, issued April 28, 1949.

Report on Operations from March 2, 1921 (effective date of license) to December 31, 1946, inclusive, Project No. 16, The Niagara Falls Power Company, Licensee, submitted to the Commission by its Staff, dated February 23, 1949 (Exhibit No. 1 herein).

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Licensee's Answer to Order to Show Cause of March 15, 1949, and to the Staff's (revised) Report on Operations, etc., including Licensee's Motion under Rule 1.11(c), filed April 14, 1949.

Licensee's Application for amendment of Articles 2, 8 and 11 of the license for Project No. 16 was filed on February 24, 1948 (Item G).

Presiding Examiner was designated on April 26, 1949.

2116 Hearing convened on May 3, and concluded on May 4, 1949.

The official transcript contained 345 pages.

Stipulated transcript corrections were approved by the Presiding Examiner.

Licensee's Principal Brief was filed on August 3, 1949.

Brief of Commission Staff Counsel was filed on September 30, 1949.

Licensee's Reply Brief was filed on October 31, 1949.

Certification of record was filed with this decision.

Woodall, Presiding Examiner: The Commission's order, issued herein on June 24, 1948, consolidated for the purpose of public hearing the proceeding for the amendment of Article 11 of the license for Project No. 16 and the proceeding on the Commission's show cause order issued on March 15, 1949. The show cause order issued on March 15, 1949 controls both the proceeding on the establishment and maintenance of the amortization reserve required by Article 11 of the license and Section 10(d) of the Federal Power Act and the amendment of license proceeding. With that order the Commission served on Licensee, as a substitute for an earlier report by its Staff, a revised Staff "Report on Operations" dated February 23, 1949. On April 14, 1949 Licensee filed its answer to the show cause order in the amortization reserve proceeding.

* * * * * * * * * *

2126 II. Amortization Reserve Proceeding.

Section 10(d) of the Federal Power Act requires that licensees establish and maintain amortization reserves after the first 20 years of operations. Licensee's 20-year period elapsed on March 1, 1941. Since March 2, 1941, Licensee has been under statutory duty to establish and maintain these amortization reserves. Failure so to do caused the Commission to issue show cause orders herein. It must now be determined on this record what amount, if any, Licensee is required to transfer to the amortization reserves for the period of operations from March 2, 1941, through December 31, 1946. This requires construing Section 10(d) of the Act and Article 11 of the license. Both the Act and Article 11 of the license have been amended.

The effect of those amendments must be considered.
2127 Of course, it must be determined whether the
2128 license is consistent with the Act. In applying the proper accounting method to the figures reflecting Licensee's operations other detailed findings and determinations are required. Licensee is the first to experience 20 years of operations, hence, this is the first time the Commission has had this problem to decide.

• • • • • • • • • • •

2130 Earnings.

Licensee accepts the method and results of accounting for its earnings for the period March 2, 1941 through December 31, 1946, presented by the Commission's Staff report, with exceptions only regarding three items, two of which represent adjustments relative to alleged water-rights, and the other a proposed tax adjustment. If this decision agrees with Licensee's three exceptions as to these adjustments, there would be no issue as to earnings from Licensee's operations for the period involved. This means that there is agreement as to the proper *method* of accounting for earnings. The issues to be determined relative to

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earnings are thus limited to decision regarding the three disputed adjustment items.

* * * * * * * * * *

The detailed issues regarding the two water-rights adjustments (Pettebone-Cataract and International Paper Company) and regarding the proposed tax adjustment will be considered separately below. Decision on these three items as to adjustments, however made, cannot disturb the agreement as to the controlling method of accounting for earnings, and, particularly, the treatment of depre-
2131 ciation as a cost of operations. This agreement also rests upon and is consistent with the provisions of the Commission's Uniform System of Accounts, which regulates Licensee's accounting, the accounting regulations of the New York Public Service Commission, which regulates Licensee's rates, and universally recognized accounting principles concerning income accounting for public utilities. Licensee concedes that the Revised Report of the Commission's Staff, except for the three disputed adjustments, correctly reflects for the period in question the revenues from and expenses attributable to its normal project operations and properly reflects the meaning of earnings as used in Section 10(d), as amended in 1935, and Article 11 of its license now in force. What is thus conceded also constitutes what is here found and concluded, namely, that the report conforms with the intent of the Act and the present license with respect to the determination of earnings for the period. Absent alone from this finding and conclusion are findings and conclusions regarding the three adjustment items, which will appear below.

* * * * * * * * * *

2160 EARNINGS ADJUSTMENTS

As mentioned above, there are only three adjustments of earnings made by the Commission's Staff to which Licensee takes exception. Licensee concedes that all other adjustments were correctly made, both as to

method and amount. The method used by the Staff in making the conceded adjustments has been reviewed, and it is found and concluded that such adjustments are proper. The evidence as to the amounts is uncontradicted.

That leaves for decision the issues regarding the three disputed adjustments of earnings.

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2163 *Pettebone-Cataract "Water-Rights" Adjustment*

Licensee's contentions in opposition to the adjustments in earnings made by the Revised Report of the Commission's Staff,[59] by reason of the so-called Pettebone-Cataract "Water Rights", are substantially met and denied by the Commission's Order entered November 17, 1947 and Opinion No. 159. That opinion informed Licensee that

"while the form of the petition relates only to amendment of the license by striking out one of the provisions thereof, the substance of the petition relates to contemplated acquisition of so-called water rights which are claimed to be very valuable. Accordingly, we shall direct our attention to the substance rather than to the form of the petition."

In denying the petition for amendment, the opinion held:

"In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States . . . The Licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law."[60]

2164 It, of course, follows that it is equally futile for Licensee to lease and pay rental for rights it already owns under its license. On that basis rests the Staff's adjustments. Licensee paid the rental to its parent by a dis-

[59] Pp. 13-16.

[60] 6 F.P.C. 184, at pp. 186, 187.

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count on 2,000 kw of electric energy annually, which at the rate of other electric energy sold to its parent was worth $37,800 per year. The rebate to its parent in 1941 was $31,500, and was $37,800 in each of the years 1942 through 1946. The Staff added these amounts of revenues, which Licensee rebated to its parent, to "revenues received from other electric utilities." Such adjustment fits the actual mode by which Licensee, as a matter of law, paid its parent rental payments of such amounts for the use of water rights, allegedly owned by its parent, but which were in law already owned by Licensee under its Federal license. The adjustments equally could be viewed as the disallowance of payments of rentals by Licensee. Opinion No. 159 fully controls. Licensee cites no valid contra law.[61]

The order was not appealed from, although Licensee
2165 was warned by express words, as well as by its legal effects, of the substantive results upon its financial operations. But whether still open to court review or not, Licensee's contentions are without support in law. The Staff's adjustments are required by law.

International Paper Company "Water Rights"

The Revised Report of the Commission's Staff disallows payments by Licensee to the International Paper Company of $82,500 in the ten months ended December 31, 1941, and $99,000 in each of the years 1942 through 1946, for Niagara

[61] It may be noted that the allowance by the Commission of the cost of land involved in the "reacquisition by a predecessor company in 1900 of a similar mill site and water rights, owned by Central Milling Company" and others (Exception No. 14—Flour Mill Purchase), as part of the actual legitimate cost of the project as of March 2, 1921, in the amount of $650,000 actually paid therefor, is in no way inconsistent with this holding. Water rights (although claimed) were not recognized nor separately evaluated in the purchase transaction, which was allowed as a purchase of land at the arm's-length price thereof. (4 F.P.C. 466) The Pettebone-Cataract Paper Company and Cataract City Milling Company acquired land (mill sites) and alleged water rights in transactions which were inseparable as between land and alleged water rights. Subsequent transactions separated out the alleged water rights and dealt separately therewith, so that they were no longer incidents of the purchase of the mill sites. The payments by way of rebates relate solely to alleged water rights quantitatively measured in c.f.s. flow. No payments for land or the use of land are here involved. The payments by way of rebates on electric energy sold by Licensee are payments for alleged rights to the use of water, which rights to use the water Licensee already had obtained by the Federal license.

River water for power, as claimed production expenses. Licensee contends that the disallowance is erroneous, relying primarily upon one U. S. Supreme Court case.[62]

2166 This alleged water right claim is fully controlled in legal principles and result, by the holding above, regarding the Pettebone-Cataract claim. The brief of Commission Staff Counsel clearly disposes of Licensee's contentions. It is, therefore, unnecessary to go into the details of the matter in this decision. The disallowed payments by Licensee are rental payments for alleged rights to the use of water, which rights to use the water Licensee had obtained by the Federal license.

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2168 FINDINGS AND CONCLUSIONS

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2169 *Amortization Reserve Proceeding*

1. The Federal Power Act and the license for Project No. 16 require that Licensee establish the amortization reserves required by Section 10(d) of the Act after the first 20 years of operation, i.e., after March 2, 1941, by annual computations for the fraction of the year 1941 and each calendar year, consistent with the following accounting principles:

(a) To the actual legitimate original cost of the project shall be added the cost of additions thereto and better-

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[62] *International Paper Co.* v. *United States*, 282 U. S. 399. This decision does not pass upon the validity of the water rights. In short, the Court held that "The Government *purported* to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power."

The Secretary of War "proceeded on a footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

The Court gave "scant consideration to . . . a repudiation of responsibility" thus assumed. The case does not decide whether International Paper Company had valid Federal water rights. It expressly says that the Secretary of War did not ground the taking on such basis. It holds that payment must be made on the same basis upon which the taking was grounded, namely without regard to the validity or invalidity of International's claimed water rights under Federal law.

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ments thereof, which sum shall be reduced by the retirements of project property. Such amount is the sum
2170 of all costs but is net of retired plant. It would represent Licensee's gross investment at any point of time.

(b) Annual depreciation shall be treated as a cost of operations; and accrued depreciation shall be treated as a return of capital to Licensee made by the rate-payers through the payment of rates sufficient to cover (1) operating expenses, (2) current depreciation as an element of operating costs, and (3) profit on invested capital. Accrued depreciation shall be deducted from gross investment to obtain the net investment of the Licensee in the project at any point of time.

(c) To determine the rate of return of earnings (net profits from operations) received during any calendar year, the net investment as of the beginning and end of the year shall be averaged to obtain the average net investment employed during the year. To the average net investment shall be added the average working capital required for operations during the year. The result is the base for the computation of rate of return. Such base represents the "net investment" referred to in Section 10(d) of the Act in the words: "accumulated in excess of a specified reasonable rate of return upon the net investment of a
2171 licensee", and in Article 11 of the present license in the words: "Six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provision of Section 10(d) of the Act".

(d) One-half of the excess of earnings (surplus earnings) received in any calendar year over the amount of return at 6% per annum, computed upon the base for the computation of rate of return (net investment for the purpose herein involved), shall be credited to the amortization reserve account, when no outstanding deficit earnings below 6% per annum in the prior year or years have been experienced. If such deficit earnings for the prior year

or years have been experienced, such deficit amount shall be deducted from such surplus earnings thereafter experienced during the next year or years; and one-half of the remaining surplus earnings, thus cumulatively computed, shall be credited to the amortization reserve account. Except as to this cumulative computation of surplus earnings, after offsetting deficit earnings against subsequent surplus earnings, the Revised Report of Operations of Licensee (prepared by the Commission's Staff and served upon Licensee by the Commission's show cause order entered March 15, 1949) is in accordance with these findings and conclusions and correctly reflects the application of
2172 the requirements of Section 10(d) of the Act and Article 11 of the present license for Project No. 16, as to the establishment of amortization reserves for the period from March 2, 1941 through the year 1946. Finding No. 4 below sets forth the corrected cumulative crediting method and result.

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2173 4. Licensee's earnings from normal operations of Project No. 16 for the ten months of 1941, and each of the years 1942 through 1946, to be compared with a return of 6% per annum upon the base for computing the rate of return, the surplus earnings (or the deficit below 6% per annum) for the same periods, one-half of such surplus earnings to be credited to the amortization reserves on the cumulative basis shown, and the total amount to be credited to Account 258.1, Amortization Reserve-Federal, are as follows:

Period	Base	Earnings	Specified Return (6%)	Surplus Earnings	Amortization Reserve Credits
3/2/41 to 12/31/41	$36,101,556.74	$2,480,131.61	$1,805,077.84	$ 675,053.77	$337,526.88
Year 1942	35,817,450.85	2,600,032.64	2,149,047.05	450,985.59	225,492.80
Year 1943	35,464,320.95	2,298,684.44	2,127,859.26	170,825.18	85,412.59
Year 1944	34,925,610.46	1,952,641.25	2,095,536.63	(142,895.38)	—
Year 1945	34,076,789.61	2,027,324.21	2,044,607.38	(17,283.17)	—
Year 1946	33,286,819.28	2,689,387.25	1,997,209.16	692,178.09	265,999.77
3/2/41 to 12/31/46		$14,048,201.40	$12,219,337.32	$1,828,864.08	$914,432.04

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2174 5. Section 10(d) of the Act and Article 11 of the license for Project No. 16, as amended on May 14, 1947 and now in force, require Licensee to make the proper accounting entries, pursuant to the Uniform System of Accounts Prescribed for Public Utilities and Licensees under the Act, of the figures hereinabove found and concluded to be correct, including particularly the credit of $914,432.04 to the amortization reserve account, and to compute for each succeeding year after 1946 the surplus earnings (or the deficit below 6% per annum) from operations during each such year and credit one-half of the net surplus earnings, after offsetting any deficit below 6% per annum shown in any prior year or years against any subsequent surplus earnings in any succeeding year or years, to the amortization reserve account throughout the balance of the license period, in accordance with the accounting procedures found and concluded by this decision to be required by the Federal Power Act, the present license for Project No. 16, and the rules and regulations of the Commission.

ORDERS

1. WHEREFORE, IN THE MATTER of the Niagara Falls Power Company, in Project No. 16, it is ordered, subject to review by the Commission, on appeal or on its own motion, as provided by its Rules of Practice and Procedure, that the application for amendment of Article 11 of the license for Project No. 16, filed on February 24, 1948, is hereby denied.

2175 2. WHEREFORE, IN THE MATTER of the Niagara Falls Power Company in Project No. 16, it is ordered, subject to review by the Commission on appeal or on its own motion, as provided by its Rules of Practice and Procedure, that Licensee shall, pursuant to Section 10(d) of the Federal Power Act and Article 11 of the present license for Project No. 16, credit to Account 258.1, Amortization Reserve-Federal, the amount of $914,432.04, as representing one-half of its surplus earnings from normal operations of Project No. 16 for the period from March 2,

1941 to December 31, 1946, inclusive, and shall file with the Commission, under oath, within 30 days from the date of service of this order appropriate evidence of compliance with this order. The pending motion herein to strike part of the (revised) Report of Operations is hereby denied.

This 24th day of February, 1950.

EMERY J. WOODALL,
Presiding Examiner

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2177 Filed March 16, 1950

BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of
THE NIAGARA FALLS POWER COMPANY
Project No. 16

Licensee's Exceptions to Intermediate Decision of Presiding Examiner and Motion for Oral Argument Before the Commission.

Licensee presents here its exceptions to two matters encompassed by the Findings and Conclusions of the Presiding Examiner filed herein on February 24, 1950, namely, the adjustments of "Earnings" made with respect to the so-called Pettebone-Cataract agreement and the International Paper Company agreement. Except for these two items, Licensee acquiesces in the Findings and Conclusions of the Presiding Examiner.

The provisions of paragraph (c) of Section 1.31 of the Rules of Practice and Procedure of the Commission suggest that any matter not included in exceptions to an intermediate decision shall be deemed waived. For this reason Licensee hereby states that its said acquiescence in any
2178 Finding or Conclusion of the Presiding Examiner's Decision is conditioned upon the adoption and approval by the Commission of such finding or conclusion as recommended by the Presiding Examiner. Licensee hereby reserves all its rights, in the event that the Commission shall disapprove or modify any of such recommended Findings or Conclusions to which exception is not here taken, or shall make new or different additional findings or conclusions adverse to Licensee's position or contentions hereinbefore asserted in this proceeding, to reconsideration by the Commission of all items of exception to the Revised Staff Report which were set forth in Licensee's Answer filed April 14, 1949, and of all Proposed Findings and con-

clusions of fact and law which were set forth in Licensee's Principal Brief filed August 2, 1949 and Licensee's Reply Brief filed October 28, 1949.

In summary, and subject to this reservation of rights, Licensee accepts the findings and conclusions of the Presiding Examiner as to the base for computing the allowable return under Section 10(d) of the Act as applied to Licensee, and as to the determination of revenues and expenses attributable to the operations under the Project No. 16 License for the period March 2, 1941 to December 31, 1946, except for the adjustments made with respect to the Pettebone-Cataract and International Paper Company agreements, to which adjustments exceptions are hereinafter made. Licensee also accepts the findings and conclusions of the Presiding Examiner as to the method for determining whether or not Licensee shall in years subsequent to December 31, 1946 make any accruals to the amortization reserve provided by Section 10(d) of the Act.

2179 Further, in the event that the Commission shall adopt the Presiding Examiner's Finding 5 under the heading *"Amortization Reserve Proceeding"* with respect to the method of computation for years after 1946 of surpluses or deficits in earnings and resulting accruals, if any, to the amortization reserve account, the Licensee will not press further its application for amendment of the Project No. 16 License relating to the amortization provision in the said License, but reserves its rights to renew such application and all its contentions in support thereof in the event that said Finding 5 be modified or disapproved.

EXCEPTION No. 1

Licensee hereby excepts to such part of the Finding and Conclusion numbered "4" under the heading *"Amortization Reserve Proceeding"* (page 59 of the Decision) to the extent that such Finding and Conclusion embodies or reflects the adjustments made by disallowance of payments

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in the amount of $99,000 annually to International Paper Company and by attributing to Licensee's operating revenues the amount of $37,800 annually as deriving from the sale of 2,000 kilowatts of capacity to Buffalo Niagara Electric Corporation under the so-called Pettebone-Cataract Agreement.

Licensee also excepts to the portion of the text of the Decision appearing at pages 49 to 52 thereof under the heading "Pettebone-Cataract and International Paper Company 'Water Rights'."

The grounds for this Exception with respect to the so-called Pettebone-Cataract and International Paper Company Agreements and the supporting reasons and arguments have been fully set forth in Exceptions
2180 Nos. 3 and 4 (pages 15 to 30) of Licensee's Answer filed April 14, 1949, in Point IV (pages 52 to 106) of Licensee's Principal Brief filed herein on August 2, 1949, and in Licensee's Reply Brief filed herein on October 28, 1949 at pages 21 to 34 and Appendix A thereto, all of which are hereby incorporated by reference herein and are respectfully submitted for reference and consideration by the Commission.

In brief, the adjustments in the revenues and expenses of operations of the Licensee's Project in connection with the Pettebone-Cataract and International Paper Company Agreements, which were proposed by the Staff of the Commission and have been adopted and recommended by the Presiding Examiner, involve only the question of the recognition of the right of persons to the use of water on privately owned or leased premises, after the initial diversion of such water from a navigable water of the United States has been made in accordance with the provisions of a license issued under the Federal Water Power Act and in effect since March 2, 1921. In each of these instances the arrangements with respect to the use of a specified amount of water of upland parcels adjoining the premises now under license

were made prior to the enactment of the Federal Water Power Act in 1920. In the case of the Pettebone-Cataract Agreement, the rights to draw and use water from the artificial canal of Licensee's predecessor have been adjudicated as valid rights under the only law then applicable, namely, the law of the State of New York. *Hydraulic Power Company of Niagara Falls* v. *Pettebone-Cataract Paper Company,* 112 (N. Y.) Misc. 528 (1920); affd. 198 App. Div. 644 (1921).

In the case of the International Paper Company, its use of water has been adjudicated and recognized as a
2181 valid right under Federal law in connection with an appropriation by the United States during World War I of what is now project property under license, and the utilization of such project property to the detriment of the rights of the International Paper Company which are now here at issue. *International Paper Company* v. *United States,* 68 Ct. Cls. 414 (1929); cert. grtd. 281 U. S. 710 (1930), rvsd. 282 U. S. 399 (1931).

Licensee respectfully submits that its obligations under the Pettebone-Cataract and International Paper Company Agreements should be fully recognized in the determination of revenues and expenses attributable to the operations under the License for Project No. 16 for the years in question in this proceeding.

Licensee has annexed as Schedule A to these Exceptions as a part hereof a revised tabulation of the figures and amounts which are presented in the tabulation forming a part of the Presiding Examiner's Finding 4 on page 59 of the Decision. This revised tabulation reflects the effect of allowance of the payments made annually to International Paper Company by the Licensee and elimination of the artificial increase in operating revenues proposed by the Staff and adopted by the Presiding Examiner with respect to the Pettebone-Cataract Agreement, or in other words, reflects the accounting actually made upon the books

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of the Licensee with respect to the International Paper Company and Pettebone-Cataract Agreements, in reliance on the validity of said agreements and of the rights involved therein.

2182 EXCEPTION No. 2

Licensee excepts to the Proposed Finding numbered 5 of the Decision (on page 60) and to Clause 2 under the caption "ORDERS" appearing on page 61 of the Decision, to the extent that the proposed determination of amortization reserve liability of the Licensee for the period from March 2, 1941 to December 31, 1946, inclusive, in the amount of $914,432.04, includes and derives from the adjustments of revenues and expenses in connection with the Pettebone-Cataract and International Paper Company Agreements which are the subject of Exception No. 1 above.

As is shown on Schedule A annexed to these Exceptions, the amount of credit to amortization reserve account to be included in Proposed Finding 5 and in Clause 2 under the caption "ORDERS", consistent with Licensee's Exception No. 1, should be "$515,432.04" instead of $914,432.04"; and Licensee respectfully requests that Proposed Finding 5 and Clause 2 of the Orders proposed and recommended by the Presiding Examiner be modified accordingly.

In lieu of and in substitution for the Findings and Conclusions of the Presiding Examiner which are the subject of Exception No. 1 above, Licensee respectfully requests that the Commission make the following findings, which were submitted by Licensee under the heading "Proposed Findings" on pages 108 and 109 of Licensee's Principal Brief filed herein on August 2, 1949. Said Findings, as here proposed and requested by the Licensee, are as follows:

"The payments, in respect of rights to the use from the Hydraulic Canal of the Licensee of 262 cfs of water at a head of 100 feet, leased by the Licensee from Buffalo
2183 Niagara Electric Corporation, as successor to Niagara, Lockport and Ontario Power Company under a Deed and Agreement of May 1, 1925, received by the Licensee from Buffalo Niagara Electric Company pursuant to the obligations provided in said Deed and Agreement, are not to be artificially adjusted for the purposes of computations or accounting under Section 10(d) of the Federal Power Act, but are to be recorded in such accounting in conformity with the books and records of the Licensee."

"The payments required to be made by the Licensee to International Paper Company under and pursuant to the provisions and obligations of an Agreement of March 1, 1919 as amended by Agreement of August 1, 1937, made between International Paper Company and the Licensee, as consideration for the grant and release of certain rights to the use of 730 cfs of water, are not to be disregarded for the purposes of computations or accounting under Section 10(d) of the Federal Power Act, or otherwise disallowed, but are to be recorded in such accounting in conformity with the pertinent entries in the books and accounts of the Licensee."

Licensee hereby respectfully adopts and incorporates by reference as a part of these Exceptions and hereby submits to the Commission for consideration as its Briefs to accompany these Exceptions, Licensee's Answer filed herein on April 14, 1949, Licensee's Principal Brief filed herein on August 2, 1949 and Licensee's Reply Brief filed herein on October 28, 1949, and respectfully requests consideration by the Commission of its contentions and arguments therein set forth.

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BLEED THROUGH-

Dated March 16, 1950.

2185 Respectfully submitted,

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2186 **Schedule A.**

THE NIAGARA FALLS POWER COMPANY

REVISION OF TABULATION IN PRESIDING EXAMINER'S FINDING NO. 4 ON PAGE 59 OF DECISION ADJUSTED TO REFLECT LICENSEE'S EXCEPTION NO. 1

Period	Base	Earnings	Specified Return (6%)	Surplus Earnings	Amortization Reserve Credits
Mar. 2, 1941 to Dec. 31, 1941	$36,101,556.74	$2,366,131.61	$1,805,077.84	$ 561,053.77	$280,526.89
Year 1942	35,817,450.85	2,463,232.64	2,149,047.05	314,185.59	157,092.79
Year 1943	35,464,320.95	2,161,884.44	2,127,859.26	34,025.18	17,012.59
Year 1944	34,925,610.46	1,815,841.25	2,095,536.63	(279,695.38)	—
Year 1945	34,076,789.61	1,890,524.21	2,044,607.38	(154,083.17)	—
Year 1946	33,286,819.28	2,552,587.25	1,997,209.16	555,378.09	60,799.77
Mar. 2, 1941 to Dec. 31, 1946		$13,250,201.40	$12,219,337.32	$1,030,864.08	$515,432.04

* * * * * * * * * *

2189 Filed March 16, 1950

BEFORE THE FEDERAL POWER COMMISSION

Project No. 16

In the Matter of

THE NIAGARA FALLS POWER COMPANY

Exceptions of Staff Counsel to Decision of Presiding Examiner

Comes now Commission staff counsel, pursuant to Section 1.31 of the Commission's General Rules and Regulations (18 CFR 1.31), and files these exceptions as hereinafter set forth, to the findings, conclusions, and order recommended by the Presiding Examiner and filed February 24, 1950 in the amortization reserve proceeding in the above-entitled matter.

* * * * * * * * * *

2198 III.

Exception is taken to the failure of the Presiding Examiner to make findings with respect to the three items of adjustments on which representatives of licensee and the Commission's staff were unable to agree. It is recommended that the Presiding Examiner's Findings be supplemented by the addition of the following:

"6. During the period from March 1941 through December 1946, and prior thereto, Licensee has delivered to its parent, Buffalo Niagara Electric Corporation, 2,000 kw of project electric energy annually, at cost of production, pursuant to a contract with Buffalo Niagara for the use by Licensee of 262.6 c.f.s. of water under rights allegedly owned by Buffalo Niagara, such alleged water rights having been derived from the so-called Pettebone-Cataract interests.

"7. The Commission has passed upon Licensee's claim of alleged Pettebone-Cataract water rights in its Opinion

BLEED THROUGH-

No. 159 and order of November 17, 1947, 6 F. P. C. 184, 73 PUR (NS) 28. Since Licensee did not seek rehearing and court review of the Commission's order, as provided in Section 313 of the Act, it has waived any further
2199 claim it may have had for further hearing upon such claim.

"8. The adjustments in the staff report of February 23, 1949 in this proceeding, in respect to sales of power to Buffalo Niagara Electric Corporation by reason of the denial of Licensee's claim of alleged Pettebone-Cataract water rights, are necessary to correctly state the amount of project revenues which should have been collected from Buffalo Niagara for power produced by the alleged Pettebone-Cataract water during the period from March 1, 1941 through December 31, 1946.

"9. Licensee claims credit as part of its operating expenses for payments of approximately $99,000 annually to the International Paper Company since the commencement of the amortization period. This claim is grounded on an alleged private property right said to be held by International Paper Company in the waters of a navigable boundary water of the United States, the Niagara River, for the development of hydroelectric power. The International Paper Company had no authority from the United States for the period in question (March 1, 1941 through December 31, 1946) to use water from the Niagara River for power development at Niagara Falls.

"10. By virtue of the license for Project No. 16 issued March 2, 1921, pursuant to the Federal Power Act, Licensee has been granted all rights necessary and requisite for the use of water in Project No. 16 for power purposes at Niagara Falls. Accordingly, all water rental payments made to International Paper Company since that time are not proper charges as part of the cost of operating Project No. 16.

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2200 IV.

Exception is taken to the Presiding Examiner's proposed order in the Amortization Reserve Proceeding to the extent that it requires the establishment and maintenance of amortization reserves on a so-called cumulative basis.

It is recommended that the proposed order be amended to read:

"2. In the Matter of The Niagara Falls Power Company, Project No. 16, It Is Ordered, that Licensee shall, pursuant to Section 10 (d) of the Federal Power Act and Article 11 of the present license for Project No. 16, credit to Account 258.1, Amortization Reserve—Federal:

as of December 31, 1941—$337,526.89;
as of December 31, 1942— 225,492.80;
as of December 31, 1943— 85,412.59;
as of December 31, 1944— 0
as of December 31, 1945— 0
as of December 31, 1946— 346,089.05;

in the total amount of $994,521.33, as representing one-half of its surplus earnings received in any calendar year from normal operations of Project No. 16 for the period from March 2, 1941 to December 31, 1946, inclusive, and shall file with the Commission, under oath, within 30 days from the date of service of this order appropriate evidence of compliance with this order. The pending motion herein to strike part of the (revised) Report of Operations is hereby denied."

Respectfully submitted,

Willard W. Gatchell
Assistant General Counsel

Joseph B. Hobbs
Commission Staff Counsel

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BLEED THROUGH-

2204 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Mon C. Wallgren, Chairman, Thomas C. Buchanan, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

September 25, 1950

Opinion No. 200

Project No. 16

In the Matter of

THE NIAGARA FALLS POWER COMPANY

APPEARANCES

For the Licensee
Randall J. LeBoeuf, Jr., Esq.
Lauman Martin, Esq.
Chauncey P. Williams, Jr., Esq.

For the Staff of the Commission
Willard W. Gatchell, Esq.
Joseph B. Hobbs, Esq.
Joan Moon, Esq.

2205 The Commission's order, issued herein on June 24, 1948, consolidated for the purpose of public hearing the proceeding for the amendment of Article 11 of the license for Project No. 16 and the proceeding on the Commission's show cause order issued on March 17, 1948. The proceeding on the show cause order issued on March 17, 1948, controls both the proceeding on the establishment and maintenance of the amortization reserve required by Article 11 of the license and Section 10 (d) of the Federal Power Act and the amendment of license proceeding. With that order the Commission served on Licensee, as a substitute for an earlier report by its Staff, a revised Staff "Report on Operations" dated February 23, 1949. On April 14, 1949, Licensee filed its answer to the show cause order in the amortization reserve proceeding. The deci-

sion of the Presiding Examiner was filed February 24, 1950.

Exceptions to the Examiner's decision were filed by Licensee and the Staff and oral argument was heard by us on those exceptions. After considering the exceptions and the oral argument we are in general accord with the substance of the Examiner's decision with a few changes as hereinafter set forth.

There were two principal items of dispute over the Examiner's decision. One item related to the so-called water rights of the Pettebone-Cataract interests and the
2206 International Paper Company. The Examiner correctly decided this issue but failed to give adequate reasons and to make the necessary findings upon the record in support of his conclusions.

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We will take up the questions in the order in which they have arisen.

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2207 II. Amortization Reserve Proceeding

Section 10(d) of the Federal Power Act requires that licensees establish and maintain amortization reserves after the first 20 years of operations. Licensee's 20-year period elapsed on March 1, 1941. Since March 2, 1941, Licensee has been under statutory duty to establish and maintain these amortization reserves. Failure so to do caused the Commission to issue show cause orders herein. It must now be determined on this record what amount, if any, Licensee is required to transfer to the amortization reserves for the period of operations from March 2,
2208 1941, through December 31, 1946.

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2209 Earnings

Licensee accepts the method and results of accounting for its earnings for the period March 2, 1941 through December 31, 1946, presented by the Staff report, with

BLEED THROUGH-

2210 exceptions only regarding three items, two of which represent adjustments relative to alleged water-rights, and the other a proposed tax adjustment.[6] If this decision agreed with Licensee's three exceptions as to these adjustments, there would be no issue as to earnings from Licensee's operations for the period involved. This means that there is agreement as to the proper *method* of accounting for earnings. The issues to be determined relative to earnings are thus limited to decision regarding the three disputed adjustment items.

• • • • • • • • • • •

The detailed issues regarding the two water-rights adjustments (Pettebone-Cataract and International Paper Company) and regarding the proposed tax adjust-
2211 ment will be considered separately below. • • • Licensee concedes that the Revised Report of the Staff, except for the three disputed adjustments, correctly reflects for the period in question the revenues from and expenses attributable to its normal project operations and properly reflects the meaning of earnings as used in Section 10(d), as amended in 1935, and Article 11 of its license now in force. What is thus conceded also constitutes what is here found and concluded, namely, that the report conforms with the intent of the Act and the present license with respect to the determination of earnings for the period. Absent alone from this finding and conclusion are findings and conclusions regarding the three adjustment items, which will appear below.

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2239 EARNINGS ADJUSTMENTS

As mentioned above, there are only three adjustments of earnings made by the Staff, to which Licensee takes exception. Licensee concedes that all other adjustments were

[6] Compare Sched. No. 3 of Exhibit 1 (p. 41) with Licensee's Schedule No. 3, which is part of Exh. 20, appearing on p. 43 of Licensee's Answer, filed April 14, 1949. See Licensee's Principal Brief, pp. 10-12.

correctly made, both as to method and amount. The
2240 method used by the Staff in making the conceded adjustments has been reviewed, and it is found and concluded that such adjustments are proper. The evidence as to the amounts is uncontradicted.

That leaves for decision the issues regarding the three disputed adjustments of earnings.

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2242 *Pettebone-Cataract "Water-Rights" Adjustment*

Licensee's contentions in opposition to the adjustments in earnings made by the Revised Report of the Staff,[43] by reason of the so-called Pettebone-Cataract "Water Rights," are substantially met and denied by the Commission's Order entered November 17, 1947, and Opin-
2243 ion No. 159. That opinion informed Licensee that "while the form of the petition relates only to amendment of the license by striking out one of the provisions thereof, the substance of the petition relates to contemplated acquisition of so-called water rights which are claimed to be very valuable. Accordingly, we shall direct our attention to the substance rather than to the form of the petition." In denying the petition for amendment, the opinion held:

"In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States . . . The Licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law."[44]

It, of course, follows that it is equally futile for Licensee to lease and pay rental for rights it already owns under its license. On that basis rests the Staff's adjustments.

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[43] Pp. 13-16.

[44] 6 F.P.C. 184, at pp. 186, 187.

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Licensee paid the rental to its parent by a discount on 2,000 kw of electric energy annually, which at the rate of other electric energy sold to its parent was worth $37,800 per year. The rebate to its parent in 1941 was $31,500, and was $37,800 in each of the years 1942 through 1946. The Staff added these amounts of revenues, which Licensee rebated to its parent, to "revenues received from other electric utilities." Such adjustment fits the ac-
2244 tual mode by which Licensee, as a matter of law, paid its parent rental payments of such amounts for the use of water rights, allegedly owned by its parent, but which were in law already owned by Licensee under its Federal license. The adjustments equally could be viewed as the disallowance of payments of rentals by Licensee. Opinion No. 159 fully controls. Licensee cites no valid contra law.[45] The order was not appealed from, although Licensee was warned by express words, as well as by its legal effects, of the substantive results upon its financial operations. But whether still open to court review or not, Licensee's
2245 contentions are without support in law. The Staff's adjustments are required by law.

International Paper Company "Water Rights"

The Revised Report of the Staff disallows payments by Licensee to the International Paper Company of $82,500 in the ten months ended December 31, 1941, and $99,000 in

[45] It may be noted that the allowance by the Commission of the cost of land involved in the "reacquisition by a predecessor company in 1900 of a similar mill site and water rights, owned by Central Milling Company" and others (Exception No. 14—Flour Mill Purchase), as part of the actual legitimate cost of the project as of March 2, 1921, in the amount of $650,000 actually paid therefor, is in no way inconsistent with this holding. Water rights (although claimed) were not recognized nor separately evaluated in the purchase transaction, which was allowed as a purchase of land at the arm's-length price thereof. (4 F.P.C. 466) The Pettebone-Cataract Paper Company and Cataract City Milling Company acquired land (mill sites) and alleged water rights in transactions which were inseparable as between land and alleged water rights. Subsequent transactions separated out the alleged water rights and dealt separately therewith, so that they were no longer incidents of the purchase of the mill sites. The payments by way of rebates relate solely to alleged water rights quantitatively measured in c.f.s. flow. No payments for land or the use of land are here involved. The payments by way of rebates on electric energy sold by Licensee are payments for alleged rights to the use of water, which rights to use the water Licensee already had obtained by the Federal license.

each of the years 1942 through 1946, for Niagara River water for power, as claimed production expenses. Licensee contends that the disallowance is erroneous, relying primarily upon one U. S. Supreme Court case.[46] This alleged water right claim is fully controlled in legal principles
2246 and result by the holding above regarding the Pettebone-Cataract claim. The Licensee admits in its brief that "the same principles of law are applicable to both." It is, therefore, unnecessary to go into the details of the matter in this decision, except to say that Congress took every precaution to prevent these claims from being recognized or confirmed by the Federal Power Act.[47] We think it is significant here that the Niagara Falls situation was
2247 used to demonstrate the Congressional interest with

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[46] *International Paper Co.* v. *United States*, 282 U. S. 399. This decision does not pass upon the validity of the water rights. In short, the Court held that "The Government *purported* to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power."

The Secretary of War "proceeded on a footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

The Court gave "scant consideration to . . . a repudiation of responsibility" thus assumed. The case does not decide whether International Paper Company had valid Federal water rights. It expressly says that the Secretary of War did not ground the taking on such basis. It holds that payment must be made on the same basis upon which the taking was grounded, namely without regard to the validity or invalidity of International's claimed water rights under Federal law.

[47] After the Senate had added the "fair value" proviso to Section 23, Senator Wadsworth of New York offered an amendment to the *first portion* of Section 23 to provide that nothing contained in the Act shall be construed as "confirming or otherwise affecting any claim, . . . " He did not want the bill "in any way to confirm" a claim to a right at Niagara Falls. The amendment was adopted (59 Cong. Rec. 1482, 66th Cong., 2nd Sess.).

By Section 4(e), the Federal Power Commission is given authority to issue licenses " * * * for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction * * * ." It is worth noting that originally this section did not contain the word "from" in it, and that on January 13, 1920 (59 Cong. Rec. 1482), Senator Wadsworth also presented an amendment which was adopted, inserting the word "from."

> MR. WADSWORTH. The object of that is obvious. Under the language on line 20, reading "the * * * utilization of power across, along, or in any navigable stream," it would seem that the word "from" should be added, so that in the event of diversion of water to a distance from the stream, which could not be called "along" the stream, the case would be covered.

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respect to the development and utilization of power from navigable waters of the United States. *Niagara Falls Power Company* v. *Federal Power Commission,* 137 F. 2d 787, 791; cert. den. 320 U. S. 792; rehearing den. 320 U. S. 815.

It should be noted, however, that in thus complying with the directions of Congress with respect to water right claims for power purposes we are not dealing with water rights for irrigation, municipal water supply, and other purposes vested under State laws. Congress by Section 27 of the Act has expressly saved water rights of the latter class from supersedure through the issuance of a license under the Federal Power Act and, of course, our function is to carry out the purposes of the statute. First *Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 177.

The disallowed payments by Licensee are rental payments for alleged rights to the use of water, which rights to use the water Licensee had obtained on March 2, 1921, by the Federal license for Project No. 16.

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2249 FINDINGS AND CONCLUSIONS

* * * * * * * * * *

2250 *Amortization Reserve Proceeding.*

1. The Federal Power Act and the license for Project No. 16 require that Licensee establish the amortization reserves required by Section 10(d) of the Act after the first 20 years of operation, i.e., after March 2, 1941, by annual computations for the fraction of the year 1941 and each calendar year, consistent with the following accounting principles:

(a) To the actual legitimate original cost of the project shall be added the cost of additions thereto and betterments thereof, which sum shall be reduced by the retirements of project property. Such amount is the sum

2251 of all costs but is net of retired plant. It would represent Licensee's gross investment at any point of time.

(b) Annual depreciation shall be treated as a cost of operations; and accrued depreciation shall be treated as a return of capital to Licensee made by the rate-payers through the payment of rates sufficient to cover (1) operating expenses, (2) current depreciation as an element of operating costs, and (3) profit on invested capital. Accrued depreciation shall be deducted from gross investment to obtain the net investment of the Licensee in the project at any point of time.

(c) To determine the rate of return of earnings (net profits from operations) received during any calendar year, the net investment as of the beginning and end of the year shall be averaged to obtain the average net investment employed during the year. To the average net investment shall be added the average working capital required for operations during the year. The result is the base for the computation of rate of return. Such base represents the "net investment" referred to in Section 10(d) of the Act in the words: "accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee," and in Article 11 of the present license in the words:
2252 "Six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provision of Section 10(d) of the Act."

(d) One-half of the excess of earnings (surplus earnings) received in any calendar year over the amount of return at 6% per annum, computed upon the base for the computation of rate of return (net investment for the purpose herein involved), shall be credited to the amortization reserve account, when no outstanding deficit earnings below 6% per annum in the prior year or years have been experienced. If such deficit earnings for the prior year or years have been experienced, such deficit amount shall

BLEED THROUGH-

be deducted from such surplus earnings thereafter experienced during the next year or years; and one-half of the remaining surplus earnings, thus cumulatively computed, shall be credited to the amortization reserve account. Except as to this cumulative computation of surplus earnings, after offsetting deficit earnings against subsequent surplus earnings, the Revised Report of Operations of Licensee (prepared by the Staff and served upon Licensee by the Commission's show cause order entered March 15, 1949) is in accordance with these findings and conclusions and
2253 correctly reflects the application of the requirements of Section 10(d) of the Act and Article 11 of the present license for Project No. 16, as to the establishment of amortization reserves for the period from March 2, 1941 through the year 1946. Finding No. 4 below sets forth the corrected cumulative crediting method and result.

* * * * * * * * * * *

2254 4. Licensee's earnings from normal operations of Project No. 16 for the ten months of 1941, and each of the years 1942 through 1946, to be compared with a return of 6% per annum upon the base for computing the rate of return, the surplus earnings (or the deficit below 6% per annum) for the same periods, one-half of such surplus earnings to be credited to the amortization reserves on the cumulative basis shown, and the total amount to be credited to Account 258.1, Amortization Reserve-Federal, are as follows:

Period	Base	Earnings	Specified Return (6%)	Surplus Earnings	Amortization Reserve Credits
3/2/41 to 12/31/41	$36,101,556.74	$2,480,131.61	$1,805,077.84	$ 675,053.77	$337,526.88
Year 1942	35,817,450.85	2,600,032.64	2,149,047.05	450,985.59	225,492.80
Year 1943	35,464,320.95	2,298,684.44	2,127,859.26	170,825.18	85,412.59
Year 1944	34,925,610.46	1,952,641.25	2,095,536.63	(142,895.38)	—
Year 1945	34,076,789.61	2,027,324.21	2,044,607.38	(17,283.17)	—
Year 1946	33,286,819.28	2,689,387.25	1,997,209.16	692,178.09	265,999.77
3/2/41 to 12/31/46		$14,048,201.40	$12,219,337.32	$1,828,864.08	$914,432.04

2255 5. Section 10(d) of the Act and Article 11 of the license for Project No. 16, as amended on May 14,

1947, and now in force, require Licensee to make the proper accounting entries, pursuant to the Uniform System of Accounts Prescribed for Public Utilities and Licensees under the Act, of the figures hereinabove found and concluded to be correct, including particularly the credit of $914,432.04 to the amortization reserve account, and to compute for each succeeding year after 1946 the surplus earnings (or the deficit below 6% per annum) from operations during each such year and credit one-half of the net surplus earnings, after offsetting any deficit below 6% per annum shown in any prior year or years against any subsequent surplus earnings in any succeeding year or years, to the amortization reserve account throughout the balance of the license period, in accordance with the accounting procedures found and concluded by this decision to be required by the Federal Power Act, the present license for Project No. 16, and the rules and regulations of the Commission.

6. During the period from March 1941 through December 1946, and prior thereto, Licensee has delivered to its parent, Buffalo Niagara Electric Corporation, 2,000 kw of project electric energy annually, at cost of production, pursuant to a contract with Buffalo Niagara for the use by Licensee of 262.6 c.f.s. of water under rights alleg-
2256 edly owned by Buffalo Niagara, such alleged water rights having been derived from the so-called Pettebone-Cataract interests.

7. The Commission has passed upon Licensee's claim of alleged Pettebone-Cataract water rights in its Opinion No. 159 and order of November 17, 1947, 6 F.P.C. 184, 73 PUR (NS) 28. Since Licensee did not seek rehearing and court review of the Commission's order, as provided in Section 313 of the Act, it has waived any further claim it may have had for further hearing upon such claim.

8. The adjustments in the Staff Report of February 23, 1949, in this proceeding, in respect to sales of power to Buffalo Niagara Electric Corporation by reason of the de-

BLEED THROUGH-

nial of Licensee's claim of alleged Pettebone-Cataract water rights, are necessary to correctly state the amount of project revenues which should have been collected from Buffalo Niagara for power produced by the alleged Pettebone-Cataract water during the period from March 1, 1941 through December 31, 1946.

9. Licensee claims credit as part of its operating expenses for payments of approximately $99,000 annually to the International Paper Company since the commencement of the amortization period. This claim is grounded on an alleged private property right said to be held by International Paper Company in the waters of a navigable boundary water of the United States, the Niagara River, for the development of hydroelectric power. The International Paper Company had no authority from the United States for the period in question (March 1, 1941 through December 31, 1946) to use water from the Niagara River for power development at Niagara Falls.

2257

10. By virtue of the license for Project No. 16 issued March 2, 1921, pursuant to the Federal Power Act, Licensee has been granted all rights necessary and requisite for the use of water in Project No. 16 for power purposes at Niagara Falls. Accordingly, all water rental payments made to International Paper Company since that time are not proper charges as part of the cost of operating Project No. 16.

ORDER

The Commission *orders:*

(A) The application for amendment of Article 11 of the license for Project No. 16, filed February 24, 1948, is hereby granted and Article 11 is hereby amended to read as follows:

After the first 20 years of operation of the project under this license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves, pursuant to Section

10(d) of the Act; one-half of all earnings in excess of six (6) per cent per annum shall be paid into such amor-
2258 tization reserves and such amortization reserves shall be established, maintained and disposed of in accordance with the terms of the Act and such rules, regulations and orders of the Commission as may be adopted pursuant thereto.

(B) The Licensee shall, pursuant to Section 10(d) of the Federal Power Act and Article 11 of the license for Project No. 16, as herein amended, credit to Account 258.1, Amortization Reserve—Federal, the amount of $914,432.04, as representing one-half of its surplus earnings from normal operations of Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive, and shall file with the Commission, under oath, within 30 days from the date of issuance of this order, appropriate evidence of compliance therewith.

(C) Effective as of March 2, 1941, and during the balance of the license period unless otherwise ordered, one-half of the excess or surplus earnings received in any calendar year over the amount of return at six percent per annum, computed upon the base for the computation of rate of return (net investment for the purpose herein involved), shall be credited to the Amortization Reserve Account when no outstanding deficit earnings below six percent per annum in the prior year or years have been experienced; provided that if such deficit earnings for the prior year or years have been experienced, such deficit amount shall be deducted from such surplus earnings thereafter experienced during the next year or years, and one-half of the
2259 remaining surplus earnings thus cumulatively computed, shall be credited to the Amortization Reserve Account.

(D) The Licensee's motion, filed with its Answer, to strike a portion of the Staff Report of Operations of Project No. 16, dated February 23, 1949, is hereby denied.

BLEED THROUGH-

By the Commission. Commissioner Draper dissents as to the conclusion reached on water rights. Commissioner Smith filed a separate concurring statement.

LEON M. FUQUAY,
Secretary.

Date of Issuance: September 27, 1950

2260 Project No. 16

In the Matter of

The Niagara Falls Power Company

SMITH, Commissioner, Concurring:

I concur in disallowing the payments for so-called "water rights" because I am persuaded that here, as in the Commission's disposition earlier of the claims of this licensee in respect of the "Pettebone-Cataract Water Rights",[1] we are precluded from acting otherwise by the decision of the court in *Niagara Falls Power Company* v. *Federal Power Commission.*[2]

As I understand the opinion of the Court of Appeals for the Second Circuit in that case, it was held that this licensee could acquire valid rights to divert and use water from the Niagara River only from the Federal Government, and, subsequent to the enactment of the Federal Water Power Act, only under license from this Commission,—although in passing it may be pointed out that the Commission's instant allowance of some $1,750,000 (paid to the State of New York as a charge for water) in the computation and adjustment of earnings is scarcely consistent with this view.

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[1] *The Niagara Falls Power Company,* 6 F.P.C. 184 (1947). In that case I was prevented by illness from filing, as intended, a separate concurrence stating essentially the same position as that taken herein.

[2] 137 F (2d) 787, 791 (1943); cert. denied by United States Supreme Court 320 U. S. 792; rehearing denied 320 U. S. 815.

The Court's decision, of course, deals only with
2261 this licensee and the question of its rights to divert and use water from the Niagara River, an international boundary stream. As I understand the opinion, it emphasizes the fact that any diversion had to be subject to the International Treaty of 1910, to which the Federal Government rather than the State of New York is a party.

The position of the staff and the action of the Commission herein, however, carry at least the plain implication that the doctrine developed in respect of this licensee on this river will be applied to other licensees on other streams to support the disallowance of claims relating to obligations assumed or payments made for "water rights", unless, perhaps, such payments have perchance been commingled with and concealed in payments for lands whose accepted values have unquestionably been increased by reason of their association with the utilization of water power.[3]

I do not wish my concurrence in the action now taken with respect to this licensee on this international stream to be construed as acquiescence in any such broadening of the application of a doctrine which, it seems to me, would directly conflict with the recognition given in Sec. 14 of the Act to the fact that the net investment of licensees may include "values allowed for water rights . . . [but not] in excess of the actual reasonable cost thereof at the time of
2262 acquisition by the licensee." This language, together with other pertinent provisions of the Act constituted, in my opinion, recognition by the Congress in 1920 that valid rights to make use of water for power purposes existed and had been transferred and acquired for *bona fide* payments at arm's length and in accordance with the customs and general understanding of the law at that time.

NELSON LEE SMITH, *Commissioner.*

September 26, 1950

Date of Issuance: September 27, 1950

[3] For example, *inter alia*, The Niagara Falls Power Co., Licensee 4 F.P.C. 464 (1943); Minnesota Power & Light Co., Licensee 4 F.P.C. 690 (1944) and 730 (1944); and Carolina Power and Light Co., Licensee 4 F.P.C. 1110 (1945).

BLEED THROUGH-

2265 Filed October 23, 1950

BEFORE THE
FEDERAL POWER COMMISSION

Project No. 16

In the Matter of

THE NIAGARA FALLS POWER COMPANY
(NIAGARA MOHAWK POWER CORPORATION, Successor Licensee)

Licensee's Petition for Rehearing.

NIAGARA MOHAWK POWER CORPORATION ("Niagara Mohawk"), Successor Licensee and Petitioner for rehearing in this proceeding, is the successor by merger, effected on October 19, 1950, to The Niagara Falls Power Company and is the transferee from that Company of the License for Project No. 16. By effect of the merger, pursuant to Section 85 of the New York Stock Corporation Law, Niagara Mohawk has succeeded to all of the estate, property, rights, privileges and franchises of The Niagara Falls Power Company, subject to all its liabilities and obligations. The transfer of the Project No. 16 License by effect of the merger was approved by the Federal Power Commission by order dated September 25, 1950 entitled, *"In the Matter of The Niagara Falls Power Company and Niagara Mohawk Power Corporation, Project No. 16"* and issued on September 27, 1950.

On September 27, 1950 the Commission issued in this proceeding its Opinion No. 200 and accompanying Order containing at pages 46 to 54 the Commission's Findings
2266 and Conclusions, and, at pages 54 to 56 thereof, the Commission's Order.

By Clause (B) of the said Order, the Commission ordered that the Licensee shall credit to Account 258.1, Amortization Reserve—Federal, the amount of $914,432.04, as representing one-half of its surplus earnings from normal op-

erations of Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive.

The Petitioner, as successor Licensee, respectfully requests rehearing in respect of the said Clause (B) of the Order to the extent that its provisions require any credit to such amortization reserve account in excess of the amount of $514,432.04. The difference of $399,000 between the amount of credit to amortization reserve ordered by the Commission and the stated amount accepted by the Petitioner arises out of two adjustments of elements of computation of surplus earnings and of the amounts to be credited to amortization reserve account, namely, the adjustment by increase by the Commission of the amount of project revenues related to the so-called Pettebone-Cataract water rights by the amount of $37,800 annually, and the disallowance by the Commission of operating expenses, in the amount of $99,000 annually, paid by the Licensee to International Paper Company under a contract relating to the use by the Licensee of certain water rights formerly owned and utilized by International Paper Company. The adjustment of project revenues is the subject of the Findings numbered 6, 7 and 8 (at pages 52 and 53) in the Commission's Opinion No. 200, and the disallowance as operating expenses of the payments to International Paper Company is the subject of Findings Nos. 9 and 10 (pages 53-54) of the Opinion. The adjustment and disallowance thus ordered will have continuing effect in succeeding years throughout the term of Project No. 16 License.

2267 In ordering the creation of the reserve and in determining the amount to be credited thereto for the 1941-1946 period, the Commission has relied and acted upon the theory that the parties to whom these payments and charges were made were not the possessors of valid rights which the Licensee was obligated to recognize, but that the Licensee itself was the owner of these rights by virtue of its Federal license. The Commission has thereby erred in failing to recognize rights which the Licensee has been and is obliged by law to recognize, such rights being valid prop-

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erty rights and contractual rights deriving from and existing under State law.

The determination of the Commission with respect to these adjustments and disallowances is unsupported by and in conflict with fundamental principles of the law under the Constitution of the United States, and with the interpretation and application of that instrument by applicable decisions of the Supreme Court of the United States.

Petitioner presents in the following paragraphs, in support of its detailed allegations of error, the principles of law properly applicable in respect of the adjustments and disallowances in respect to the Pettebone-Cataract and International Paper Company rights, and cites therewith cases upon which, among others, Petitioner relies in support of the respective legal principles.

SPECIFICATIONS OF ERROR.

With respect to the Commission's determinations made with respect to the *"Pettebone-Cataract 'Water-Rights' Adjustment"* and the *"International Paper Company 'Water Rights',"* which are the subject of Findings Nos. 6, 7, 8, 9 and 10 accompanying Opinion No. 200 and of the text of that Opinion at pages 39 to 44, the determinations
2268 of "Earnings," "Specified Return," "Surplus Earnings" and "Amortization Reserve Credits" stated in Finding No. 4 at page 51 of the Opinion, and the amount of the credit to Amortization Reserve account ordered in Clause (B) of the Order accompanying said Opinion, and with respect to such parts, if any, of Finding No. 5 at page 52 of the Opinion as may require the application of such methods of adjustment of project revenues and disallowances of operating expenses to the computation of surplus earnings and credits to amortization reserve account for succeeding years after 1946 and throughout the balance of the license period, Petitioner alleges error and respectfully shows and alleges to the Commission, upon information and belief, as follows:

I. The Commission has erred in respect of both fact and law in making adjustments by way of increase of project

revenues, by the amount of $37,800 annually, in respect to sales of power by the Licensee to Buffalo Niagara Electric Corporation, as set forth in Findings Nos. 6, 7 and 8, as reflected in Finding No. 4 and in Clause (B) of the Order.

These adjustments are contrary to the facts of record, and are erroneous in law.

II. The Commission has erred in respect of both fact and law in disallowing as operating expenses of the Licensee, for the purposes of determining amortization reserve liability, payments of approximately $99,000 annually actually made by the Licensee to International Paper Company under contract as consideration for the use of valid water rights formerly owned and used by International Paper Company and by it granted to the Licensee by defeasible grant; such disallowance being the subject of Findings Nos. 9 and 10 and being reflected in Finding No. 4 and in Clause (B) of the Order.

2269 This disallowance is contrary to the facts of record and is erroneous in law.

III. To such extent, if any, as the Commission, in Finding No. 5, may have indicated or prescribed as a rule for the future, applicable to years subsequent to 1946, the adjustments and disallowances referred to in the preceding paragraphs numbered I and II, the Commission has erred as a matter of law.

The legal premises upon which the Commission has based its determinations of adjustments and disallowances as aforesaid, as the same are stated in its Opinion No. 200, are erroneous for the following reasons:

A. The right to divert water for power purposes from the Niagara River is a property right created and existing under State law and deriving therefrom; and does not derive from the government of the United States, which has no proprietary or property interest in the Niagara River.

Martin v. *Waddell,* 16 Peters (41 U. S.) 367, 410 (1842);

Pollard's Lessee v. *Hagan,* 3 How. (44 U. S.) 212 (1845);

Mumford v. *Wardwell,* 6 Wall. (73 U. S.) 423, 426 (1867);
Weber v. *The Board of Harbor Commissioners,* 18 Wall. (86 U. S.) 57, 65 (1873);
County of St. Clair v. *Lovingston,* 23 Wall. (90 U. S.) 46, 68 (1874);
Barney v. *Keokuk,* 94 U. S. 324, 338 (1876);
Illinois Central Railroad Co. v. *Illinois,* 146 U. S. 387, 434-437 (1892);
Shively v. *Bowlby,* 152 U. S. 1, 48-50 (1893);
2270 *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 702-703 (1899);
Kansas v. *Colorado,* 206 U. S. 46, 93-94 (1907);
McGilvra v. *Ross,* 215 U. S. 70 (1909);
Scott v. *Lattig,* 227 U. S. 229, 242-243 (1912);
United States v. *Cress,* 243 U. S. 316, 319-320 (1916);
International Bridge Co. v. *New York,* 254 U. S. 126, 132-133 (1920) (Niagara River);
United States v. *Holt State Bank,* 270 U. S. 49, 54 (1926);
Massachusetts v. *New York,* 271 U. S. 65, 89 (1926);
Fox River Paper Co. v. *Railroad Commission,* 274 U. S. 651, 655 (1927);
Ford & Son, Inc. v. *Little Falls Fibre Co.,* 280 U. S. 369, 375-379 (1930);
International Paper Co. v. *United States,* 282 U. S. 399, 404, 405 (1931) (Niagara River at Niagara Falls);
United States v. *Central Stockholders' Corporation,* 52 F. 2d 322, 329-333 (CCA-9, 1931);
United States v. *Gerlach Live Stock Co.,* 339 U. S. 725, 734, 739 (1950);
United States v. *Kansas City Life Insurance Co.,* 339 U. S. 799, 808, 809 (1950).

B. The Project No. 16 License for the diversion of waters of the Niagara River for power purposes is not a grant of any property interest by the United States, but is a consent

to the use of property rights acquired and existing under the laws of the State of New York.

United States v. *Cress*, 243 U. S. 316, 326-327 (1917);
2271 *International Bridge Company* v. *New York*, 254 U. S. 126, 132, 133 (1920) (Niagara River);
United States v. *Central Stockholders Corp.*, 52 F. 2d 322, 323 (CCA-9, 1931);
Pike Rapids Power Company v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F. 2d 902, 908-909 (CCA-8, 1938), cert. denied 305 U. S. 660, 306 U. S. 640 (1939), rehearing denied 306 U. S. 667 (1939);
First Iowa Coop. v. *Power Comm'n*, 328 U. S. 152, 173-174, 178 (1946);
Grand River Dam v. *Grand-Hydro*, 335 U. S. 359, 372 (1948);
United States v. *1532.63 Acres of Land, etc.*, 86 F. Supp. 467, 469-470 (D. C., W. D. So. Car., 1949);
United States v. *Kansas City Ins. Co.*, 339 U. S. 799, 804-808 (1950).

C. The Pettebone-Cataract and International Paper Company water rights were rights to utilize the water entirely upon and within uplands, after the diversion of the waters from the Niagara River by the Licensee and before its return thereto; they involved no direct diversions from the River, but only diversions from the power canals of the Licensee.

D. The United States, by its Congress, officers and agencies, by the Burton Act of 1906 (34 Stat. 626) and the administration of permits thereunder, in Article V of the International Boundary Waters Treaty of 1909 (36 Stat. 2445), and in the issuance and administration of permits under Congressional Joint Resolutions in 1917, 1918 and 1919, and this Commission in the granting of the
2272 Project No. 16 License in 1921, have recognized the existence of the Pettebone-Cataract and International Paper Company rights as valid interests in the use of waters diverted by the Licensee's predecessors and the Licensee.

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E. The Pettebone-Cataract water rights were adjudicated by the courts of the State of New York to be valid rights of property.

Hydraulic Power Company of Niagara Falls v. *Pettebone-Cataract Paper Company,* 198 App. Div. 644, 646 (1921); affg. 112 Misc. 528 (1920).

F. The Commission has misconstrued the opinion of the Supreme Court of the United States in *International Paper Company* v. *United States,* 282 U. S. 399. In footnote 46 to Opinion No. 200 (appearing at page 42 of the Opinion as issued) the Commission has stated that "This decision does not pass upon the validity of the water rights." On the contrary, the opinion in that case shows clearly that the Court considered the right of diversion of International Paper Company to be a vested right and property interest under State law, characterized by the Court as "a right that by the laws of New York was a corporeal hereditament and real estate."

International Paper Company v. *United States,* 282 U. S. 399, 404, 405 (1931). See also pages 404, 407, 408.

G. The Licensee is bound under State law to recognize the validity of the outstanding rights and the existence of the contractual obligations based thereon and derived therefrom, and to perform the contractual obligations unless and until relieved therefrom by the judgment or decree of a court of competent jurisdiction.

2273 Federal Power Act, Section 27;
Ford & Son, Inc. v. *Little Falls Fibre Co.,* 280 U. S. 369 (1930).

See:

Matter of Aluminum Company of America v. *Maltbie,* 289 N. Y. 359 (1942).

H. The Commission has, therefore, erred in holding, at page 40 of Opinion No. 200, and by relying by reference

upon its Opinion No. 159 (6 F. P. C. 184 at 186-187), that the Licensee has "under the license" the right to use the 262.6 c.f.s. "which it already possesses to the fullest extent of the law" in disregard of the rights of Niagara, Lockport and Ontario Power Company, and of Buffalo Niagara Electric Corporation as successor, under the Deed and Agreement of May 1, 1925.

I. The Commission has likewise erred in holding, at page 44 of Opinion No. 200 and in Finding No. 10 thereof (page 54), that the rights to the use of water which Licensee obtained on March 2, 1921 by the Federal License for Project No. 16, were exclusive of the rights of International Paper Company, deriving from its ownership of water rights, under the Agreement of March 1, 1919.

J. No authority has been vested in the Commission by the Federal Power Act or otherwise to annul or destroy rights in the use of water which are recognized by and vested under State law, and the Commission has acted in excess of its statutory authority in disregarding such property rights and the contractual rights relating thereto in its determinations in this proceeding.

Federal Power Act, Section 27;
Ford & Son, Inc. v. *Little Falls Fibre Co.*, 280 U. S. 369 (1930).

2274 K. The Commission erred in failing to follow and apply in the determinations made in this proceeding the recognition of the rights of the Pettebone-Cataract interests and of International Paper Company which is contained in Article 13 of the Project No. 16 License as issued in 1921.

IV. By reason of the errors herein alleged and set forth, the adjustments of project revenues made by the Commission in respect of the Pettebone-Cataract water rights in Findings Nos. 6, 7, and 8 of its Opinion No. 200, and the disallowance by the Commission of the payments to International Paper Company as operating expenses in Findings Nos. 9 and 10, and the findings of Earnings, Specified Re-

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turn, Surplus Earnings and Amortization Reserve Credits set forth in Finding No. 4 of said Opinion (page 51), the credit to Amortization Reserve Account in the amount of $914,432.04 ordered by Clause (B) of the Commission's Order herein issued September 27, 1950, and any finding or conclusion contained in Finding No. 5 of said Opinion which may purport to make such adjustments and disallowances applicable to succeeding years after the year 1946, are, and each of such determinations is, contrary to fact and erroneous in law, arbitrary and capricious, and violative of Licensee's rights under its contracts with Buffalo Niagara Electric Corporation and with International Paper Company, in violation of the License contract, in violation of the provisions of the Federal Power Act and the Constitution of the United States, particularly the Fifth Amendment thereof, in excess of the statutory authority of the Commission, and

in excess of the powers of the United States and of
2275 this Commission under the Constitution of the United States and contrary to the constitutional rights, privileges and immunities of this Petitioner.

WHEREFORE, Petitioner respectfully requests that the Commission make an order granting a rehearing in this proceeding in respect of the matters and things presented and alleged in this Petition for Rehearing, and that the Commission, upon such rehearing, shall:

1. Modify its Order issued in this proceeding on September 27, 1950, and particularly Clause (B) thereof, to provide that the Licensee shall credit to Account 258.1, Amortization Reserve—Federal, the amount of $515,432.04 for the period March 2, 1941 to December 31, 1946, inclusive, instead of the amount of $914,432.04, as provided in said Order and Clause (B) thereof as issued;

2. Abrogate or modify and correct those portions of its Opinion No. 200 relating to the Pettebone-Cataract water rights under the heading *"Pettebone-Cataract 'Water-Rights' Adjustment"* appearing at pages 39 to 42 of its Opinion No. 200, as issued, and those portions of its Opinion relating to the rights of International Paper Company

under the heading *"International Paper Company 'Water Rights'"* appearing at pages 42 to 44, inclusive, of Opinion No. 200, in accordance with the facts of record in this proceeding and with correct and proper principles of law;

3. Modify and correct the Findings Nos. 4, 5, 6, 7, 8, 9 and 10 contained in Opinion No. 200, in conformity with the facts of record and correct and proper principles of law;

2276 4. Grant such other and further relief as may be just and proper in the premises.

Dated, October 20, 1950.

Respectfully submitted,

NIAGARA MOHAWK POWER CORPORATION,
Licensee under the License, Project No. 16,
Petitioner for Rehearing,

By LAUMAN MARTIN,
Vice President,
300 Erie Boulevard West,
Syracuse 2, New York.

LAUMAN MARTIN,
Vice President and General Counsel,
Niagara Mohawk Power Corporation,
300 Erie Boulevard West,
Syracuse 2, New York.

LEBOEUF & LAMB,
Attorneys for Petitioner,
15 Broad Street,
New York 5, New York.

RANDALL J. LEBOEUF, JR.,
CHAUNCEY P. WILLIAMS, JR.,
Of Counsel.

[Verified by Lauman Martin, Vice President of Petitioner, October 20, 1950.

Certificate of Service by Chauncey P. Williams, Jr., of Counsel for Petitioner, dated October 20, 1950, omitted from printing.]

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2279 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Mon C. Wallgren, Chairman; Thomas C. Buchanan, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

October 31, 1950

Project No. 16

In the Matter of

NIAGARA MOHAWK POWER CORPORATION

Order Denying Rehearing.

Niagara Mohawk Power Corporation, as successor licensee to The Niagara Falls Power Company, Project No. 16, on October 23, 1950, filed a petition for rehearing on part of the Commission's order issued September 27, 1950, and accompanying Opinion No. 200 directing that the licensee shall credit to Account 258.1, Amortization Reserve-Federal, the amount of $914,432.04, as representing one-half of the licensee's surplus earnings from normal operations of Project No. 16 for the period March 2, 1941 to December 31, 1946, inclusive.

No new facts were presented or arguments advanced in the petition for rehearing which had not been previously presented to and considered by the Commission.

The Commission *finds:*

No good reason appears for granting rehearing with respect to the portion of the Commission's order issued September 27, 1950, referred to above.

The Commission *orders:*

The petition for rehearing is hereby denied.

By the Commission.

LEON M. FUQUAY
Secretary

(OFFICIAL SEAL)

Date of Issuance: November 1, 1950

1 **EXCERPTS FROM TESTIMONY AND PROCEEDINGS.**

[Stenographer's Minutes of Hearings of May 3 and 4, 1949]

BEFORE THE
FEDERAL POWER COMMISSION

Project No. 16

In the Matter of:

THE NIAGARA FALLS POWER COMPANY

Hearing Room
Federal Power Commission
Hurley-Wright Building
1800 Pennsylvania Avenue, N. W.
Washington, D. C.
Tuesday, May 3, 1949

The above-entitled matter came on for hearing, pursuant to notice, at 9:45 a.m.

Before:

Emery J. Woodall, Presiding Examiner.

Appearances:

Randall J. Le Boeuf, Jr.,
Lauman Martin and
Chauncey P. Williams, Jr. of LeBoeuf and Lamb, 15 Broad Street, New York, N. Y., appearing on behalf of the Niagara Falls Power Company.
Willard W. Gatchell,
Joseph B. Hobbs and
Joan Moon, appearing on behalf of the Staff of the Federal Power Commission.

2 PROCEEDINGS

Presiding Examiner: The hearing in the matter of the Niagara Falls Power Company, Project No. 16, is called to

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order by the Hearing Examiner designated to preside at this hearing.

* * * * * * * * * *

Mr. Gatchell:

11 It is the view of the staff that the specified rate of return which is to be applicable in the present case is six per cent per annum. There is some difference, as I understand it—and I am not sure—there is some difference between the licensee and the staff of the Commission as to the rate base upon which that rate of return is to be calculated. It is the view of the Commission's staff that the rate base for the purpose of Section 10(d) starts with the actual legitimate original cost less accrued depreciation up to March 1 or March 2, 1941, the day on which the amortization reserve provision becomes effective for the purpose of setting aside amortization reserves.

As a matter of incidental moment, but no real concern, it has been the practice of the licensee and the staff to disregard the fact that this date starts on March 2, and to use the first day of the month merely for convenience
12 purposes, so I trust Your Honor will not become confused by our commingling of those dates, March 1 and March 2.

* * * * * * * * * *

15 Mr. Le Boeuf:

The staff of the Commission first in the year 1948 by the first proceedings, and then after we had pointed out certain errors even under their own theories by the proceedings in the year 1949, now contend that there are excess earnings. That is the basic issue in this proceeding. That issue raises certain points. I can refer to them in a tentative way only, because we can't make a full argument until we finally find out through these proceedings what the staff's true position is.

First with respect to certain payments in connection with certain water rights, one with the International Paper Com-

pany, and the other in connection with the so-called P
bone Cataract Water Rights, the staff takes the posi
that there is no such thing as the private ownershi
water rights along a navigable water of the United St
We disagree with that and with respect to the payme
the International Paper Company, we state that the U
States Supreme Court has expressly ruled to the contr

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49 Thereupon, **Kenneth A. Miller** was called as a
ness and, having been first duly sworn, was exam
and testified as follows:

Direct Examination

By Mr. Gatchell:

• • • • • • • • • •

57 Q. The first four pages of that report appea
be merely introductory, is that correct? A. Yes,
nature, purpose and scope of the report are outlined in
eral terms on those pages.

• • • • • • • • • •

Presiding Examiner: What is the period covered?

The Witness: The period covered by this report is f
March 2, 1921, through the year 1946.

• • • • • • • • • •

The Witness: The nature and purpose of the repo
set forth on page 1, and then the business of licensee,
license provisions in respect of the diversio
58 water, the license provisions regarding earnings,
then the scope of the report summarized on pag

By Mr. Gatchell:

Q. Does this report cover all of the operations of
licensee during the period—that is from March 2, 1
through December 31, 1946? A. It does not. It covers
normal operations of the company, namely the reve
expenses and profits arising from the sale of electric en

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and mechanical power produced by the use of 20,000 cfs of water. By amendments 4, 5 and 6 to the license the licensee was given temporary authorization for emergency diversion of an additional 12,500 cfs. The results of operation in connection with the emergency diversion of the additional 12,500 cfs which are accounted for separately by the licensee, are not included in this report.

• • • • • • • • • • •

60 Q. Why do you go back to the 1st day of March?

A. The license was issued and effective on March 2, 1921. For accounting purposes, however, the license had been considered by both the company and by us, as having been effective March 1, 1921. In other words, it would be too much trouble to eliminate just one day's operation. Similarly, in our other treatment of the licensee's operations we have disregarded the second day of March

61 and used the monthly period beginning with March 1.

Mr. Gatchell: Your Honor, I think there is no issue between us as to that practice.

• • • • • • • • • • •

By Mr. Gatchell:

Q. What is Schedule 1, referred to on page 6 and reproduced on page 32? A. Schedule 1 is a condensed statement by years of the results of operations from March 1, 1921 through February 28, 1941, inclusive. It is supported by Schedules 1A, 1B, and 1C, which show by years respectively, operating revenues, operating expenses and other revenue deductions.

Q. How did you obtain the figures showing the operating revenue in column 2 of Schedule 1? A. That is shown by Schedule 1A appearing on page 33 which shows the operating revenues broken down between sales of electric energy which was the major source of its revenue and other revenues. All figures are taken from the company's books.

Q. How did you obtain the total of operating revenue deductions as shown in Column 3 of Schedule No. 1. A.

Schedule 1B, page 34, sets forth the nature of the total operating expenses shown in column 4 of Schedule
62 No. 1. Schedule 1C appearing on page 35 sets forth the total of other operating revenue deductions shown in column 5 of Schedule 1, column 6 of Schedule 1 is the difference between columns 2 and 3 of the Schedule.

• • • • • • • • • • •

175 Hearing Room,
Federal Power Commission,
Room 965,
1778 Pennsylvania Avenue, N. W.,
Washington, D. C.,
Wednesday, May 4, 1949.

The above-entitled Matter came on for further hearing, pursuant to adjournment, at 10:00 a.m.

Before:

Emery J. Woodall, Presiding Examiner.

Appearances:

(Same as heretofore noted.)

• • • • • • • • • • •

177 Thereupon, **Kenneth A. Miller** was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

• • • • • • • • • • •

180 By Mr. Gatchell:

Q. On page 12 of this report, Exhibit 1, you state that a summary of operations for the period March 1, 1941, through December 31, 1946, is given in Schedule No. 3, which appears at page 41 of your report. Will you please explain that summary? A. As shown by the caption Schedule No. 3 is a summary of the normal operations of licensee for the 10 months ending December 31, 1941, and each of the calendar years from 1942 through 1946.

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The schedule also shows the source of the revenue, the nature of the operating expenses, and other operating revenue deductions which are considered as a part of the cost of operation; and on the last line the operating income as adjusted for the purposes of this report.

The schedule is supported by Schedule 3-A appearing on page 43. Schedule 3-A is a condensed analysis of production expenses; and Schedule 3-B is the summary of administrative and general expenses.

181 Schedule 3-B, I believe, is page 44.

Presiding Examiner: 43.

The Witness: 3-B is page 43, that is right. Schedule 3-A is page 42; and Schedule 3-B is page 43.

I might also add that Schedule 3 is further supported by Schedules A, B, C, D, E, F and their respective subschedules.

By Mr. Gatchell:

Q. That is Exhibit 2 in this hearing? A. Exhibit 2 in this hearing, and these schedules show in detail the results of operations as reflected in the records of the licensee, and the adjustments which were made to arrive at the figures shown in Schedule 3.

Q. Now, on schedule 3, page 41, you have some project property income.

Do you have those elsewhere in your report? A. They are summarized for ready reference on page 13.

Q. At the top of the page? A. Yes, sir.

Presiding Examiner: That is Exhibit 1?

The Witness: Of Exhibit 1, yes, sir.

By Mr. Gatchell:

Q. You state that you have made certain adjustments in the net operating income. To what adjustments do you refer? A. The adjustments made for the purposes of this report relate principally to the cost of water for power, of which there are two: One, in respect to a contract

182 with the Buffalo Niagara Electric Corporation, the present parent of licensee; and, two, the contract with the International Paper Company. The first adjustment is in connection—

Q. Now, you have explained those in your report, have you not? A. They are explained or summarized at pages 13 through 17.

Q. Now, have you anything to add to the statement appearing in that portion of your report? A. I don't believe so. The reason for making the adjustments is set out in detail on those pages.

Q. All right.

Mr. Gatchell: Mr. Examiner, if you will notice, on page 15 of the Exhibit 1 there is a reference to an application filed February 17, 1947, and that application was for an amendment of the license for Project 16. It was passed upon by the Commission in Opinion 159 and the order amended November 17, 1947.

The order, of course, and the opinion, it is presumed, do not need to be more than referred to at this place. The Commission certainly can take judicial notice of that order and opinion. But the application itself as supplemented on March 20 should be incorporated by reference.

I, therefore, ask that the application filed Febru-
183 ary 17, 1947, as supplemented by a filing on March 20, 1947—both of these filings being referred to in Opinion No. 159 amending article 13 of the original project license—be incorporated in the record by reference.

Mr. Le Boeuf: There is no objection to that, except at a later time we will want to add some additional material also as a part of the record by reference.

Presiding Examiner: In respect to this, there seem to me to be two matters involved.

One is that official notice be taken of Opinion 159 and the order entered pursuant thereto, issued November 17, 1947. Mr. LeBoeuf has already, I assume, for general purposes removed any objection which he may have. Therefore, official notice will be taken of that order.

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The other papers it would seem to me are proper to be incorporated by reference; and the application as supplemented and proposed to be incorporated by Mr. Gatchell will be incorporated by reference as Item B.

• • • • • • • • • • •

184 Mr. Le Boeuf: Mr. Examiner, would you concur that we offer the balance of the material relating to this so-called Pettebone-Cataract proceeding at this time—or later?

Mr. Gatchell: All at one time.

Presiding Examiner: It would seem to me there would be some advantage in having it all in one place in the record.

Mr. Gatchell: We have no objection to doing it that way.

Presiding Examiner: You may do it that way for convenience of everyone.

Mr. Le Boeuf: I might indicate to your Honor so that he may become familiar with that case that that case was submitted to the Commission for its approval by a direct oral argument and a stipulation of record. The stipulation of the record included the materials attached to the applications and supplemental material and certain others that I now offer so that we will have it all, the whole record.

185 Mr. Gatchell: Mr. LeBoeuf, I have a copy of the stipulation here. I was about to show it to the Examiner. (Handing document to Mr. LeBoeuf.)

Presiding Examiner: It is the sense of both counsel, apparently, that all of that record be available.

Mr. Gatchell: Well, of course, your Honor, we do not think so. Mr. LeBoeuf does, and in order to make it complete I was just about to suggest that instead of doing it by pieces if you will permit me to show you a copy of the stipulation, we can incorporate by reference all the matters referred to in the stipulation, so that then there is no question but what everything he had in mind was in. And if he has other materials he wants to put in, then he could put them in. I would not desire doing it piecemeal.

Mr. Le Boeuf: As I understand the stipulation, dated July 24, 1947, signed by Mr. Gatchell and myself, includes the entire record on which the Commission passed on that matter.

Mr. Gatchell: That is my understanding, Mr. Examiner.

Mr. Le Boeuf: And your offer then is to offer everything by reference in this record listed in the stipulation?

Mr. Gatchell: That is my suggestion, yes, sir.

Mr. Le Boeuf: I have no objection.

Mr. Gatchell: Then I make that offer formally, Mr. Examiner, so the record may show that the entire matters referred to in that stipulation may be included by reference.

Presiding Examiner: Does the Examiner understand properly that the offer is that this stipulation
186 filed with the Commission July 28, 1947, having been executed July 24, 1947, by counsel for licensee and by Mr. Gatchell, attorney for the staff of the Commission, be incorporated by reference as Item C, and thereby that the documents listed in such stipulation be deemed also to have been incorporated by reference under the same item number?

Mr. Gatchell: That is my formal request, your Honor.

Presiding Examiner: That may be done.

(Item C was incorporated in evidence by reference.)

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By Mr. Gatchell:

Q. What adjustments were made in connection with payments to the International Paper Company? A. The payments to the International Paper Company have
187 been eliminated from operating expenses in this report because they appear to involve the same considerations that are involved in the transaction between the licensee and the Buffalo Niagara Electric Corporation on account of the so-called Pettebone-Cataract matter referred to in Commission's Opinion No. 159.

Presiding Examiner: Mr. Miller, just at that point, your justification as an accountant, therefore, is that you felt

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bound by, at least on the basis of clear analogy, the decision of the Commission in Opinion No. 159?

The Witness: That is right.

Mr. Le Boeuf: Now, there is another matter, Mr. Examiner. We have received the documents in the record in the Cataract-Pettebone matter. We have the corresponding documents in connection with the International Paper matter.

Would you prefer to have those offered at this time or later? In this instance, since there has been no proceeding about it, we have copies of the documents.

Presiding Examiner: It would seem to me preferable to have this material at this point, unless counsel for the staff has some objection.

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189 Mr. Le Boeuf: I am offering the following documents in evidence.

An agreement of lease of The Niagara Falls Power Company, constituent, and the Soo Paper Company, dated September 1, 1891.

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Presiding Examiner: Does that include the cover which shows a recordation entry?

Mr. Le Boeuf: Yes, sir.

Presiding Examiner: That may be admitted in evidence as Exhibit No. 8.

(The document above referred to was received in evidence as Exhibit No. 8.)

Mr. Le Boeuf: I offer in evidence deed of The Niagara Falls Power Company, constituent to The Niagara Falls Paper Company, dated March 7, 1896. For convenience of the Examiner and counsel, I am physically offering copies, although I understand it was filed with the Federal Power Commission on August 23, 1938 by company letter dated August 19, 1938.

Presiding Examiner: The Exhibit is admitted as Exhibit No. 9.)

190 (The document above referred to was received in evidence as Exhibit No. 9.)

Presiding Examiner: The admission of these is on the basis that the Examiner understands that Commission counsel has no objection to the list which Mr. Le Boeuf is reading, and will express himself to the contrary if he desires.

Mr. Gatchell: I have acquiesced in the irregularity of proceeding in offering them now. You admitted the first one, somewhat to my surprise. I thought they were going to be marked first. Perhaps I was negligent in not stating my position. We do not think any of this is relevant. The Commission has ruled in Order No. 159 that the issue is closed. The company did not take an appeal, and they had that right, and Mr. Le Boeuf said they think they were foreclosed from raising the question. Therefore, none of these Exhibits are admissible, and I do not want the record to show that I consent to their admission.

Mr. Le Boeuf: It is a little different situation.

Mr. Gatchell: No; as far as the legal position the staff is taking.

Mr. Le Boeuf: Mr. Miller said he understands the facts of this situation to be similar to the facts in the Pettebone-Cataract case.

Mr. Gatchell: I don't think he said that.

Mr. Le Boeuf: That it raises the same issue. I
191 have forgotten the exact wording. Therefore, it may become of interest to the Examiner to see what the basic documents are to see the degree of similarity.

Presiding Examiner: Perhaps the Examiner is confused, but I understood that Opinion 159 referred to the Pettebone matter and not the Paper matter. These papers relate to the Paper Company matter.

Mr. Le Boeuf: That is right.

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Presiding Examiner: The question for the Commission is whether or not the factual situation is analogous; that being the case, it seems to me highly relevant.

Mr. Gatchell: I wish to record my objection to the admission of the Exhibits. I do not wish to repeat the objections.

Presiding Examiner: May I say we understand that carries for each of these entries that he will now read.

Mr. Le Boeuf: I next offer an agreement between The Niagara Falls Power Company, constituent, and the Niagara Falls Paper Company, dated March 7, 1896, and filed with the Commission on August 23, 1938 by letter dated August 19, 1938, together with and attached thereto a letter from The Niagara Falls Paper Company to The Niagara Falls Power Company, constituent, dated November 30, 1896, also filed at the same time as the March 7 agreement.

Presiding Examiner: On the basis of the understanding, the same objection is made and the same ruling is
192 made, and Exhibit is admitted as Exhibit No. 10.

(The document above referred to was received in evidence as Exhibit No. 10.)

Presiding Examiner: The Examiner is intrigued by the word "constituent".

Mr. Le Boeuf: Perhaps I should explain it to you. In 1918 there were consolidated three companies to form the present Niagara Falls Power Company. They were named, respectively, Cliff Electrical Distributing Company; Hydraulic Power Company of Niagara Falls—that company had its name changed—and The Niagara Falls Power Company. We identify the predecessor, The Niagara Falls Power Company, from the present Niagara Falls Power Company by the use of the word "constituent".

Presiding Examiner: Thank you, sir.

Mr. Le Boeuf: I next offer in evidence a deed from The Niagara Falls Paper Company to International Paper

Company, dated January 31, 1896. As far as we can ascertain, this document has not heretofore been filed with the Commission, and we obtained it from the Niagara County Clerk's Office.

I may state that the International Paper Company was formed in 1898 as a result of a consolidation of a large number of paper companies, and this was one of the transactions involved.

Presiding Examiner: Have you completed your offer?

193 Mr. Le Boeuf: Yes, sir.

Presiding Examiner: On the basis of the understanding that the same objection and the same ruling is made, the Exhibit is admitted as Exhibit No. 11.

(The document above referred to was received in evidence as Exhibit No. 11.)

Mr. Le Boeuf: I offer in evidence agreement between The Niagara Falls Power Company, constituent, and the International Paper Company, dated June 1, 1898, which was filed with the Commission on August 23, 1938 by company letter dated August 19, 1938.

Presiding Examiner: The same objection is understood; the same ruling, and the Exhibit is admitted as Exhibit No. 12.

(The document above referred to was received in evidence as Exhibit No. 12.)

Mr. Le Boeuf: I offer in evidence an agreement between The Niagara Falls Power Company and the International Paper Company, dated March 1, 1919, which was filed with the Commission on January 25, 1933 by company letter dated January 23, of that year.

Presiding Examiner: The same objection is overruled, and the Exhibit is admitted as Exhibit No. 13.

(The document above referred to was received in evidence as Exhibit No. 13.)

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Mr. Le Boeuf: I offer in evidence an agreement
194 between The Niagara Falls Power Company and the International Paper Company, dated August 1, 1937, filed with the Commission on August 23, 1938 by company letter dated August 19, 1938.

Presiding Examiner: "The Niagara Falls Power Company", now, is the present company and not the constituent?

Mr. Le Boeuf: That is correct.

Presiding Examiner: The same objection is overruled, and the Exhibit is admitted as Exhibit No. 14.

(The document above referred to was received in evidence as Exhibit No. 14.)

Mr. Le Boeuf: Exhibit 13 is also the present company.

Presiding Examiner: Thank you.

Mr. Le Boeuf: That finishes this particular series, Mr. Examiner.

There is a letter which I would like to offer, a copy of a letter, rather, in evidence. Mr. Gatchell has indicated a moment ago to Your Honor that a question that will be involved in this proceeding is whether or not the company had a right to appeal from the Commission's refusal to agree to the amendment of license proposed in connection with the Pettebone-Cataract matter, and that will be the subject of considerable argument, which I will not make at this time.

I think it would be helpful to the Examiner to have certain correspondence between the Commission and the licensee at that time bearing on that subject, and I believe
195 Mr. Gatchell will have a companion letter to offer.

I offer in evidence copy of a letter from The Niagara Falls Power Company to the Federal Power Commission, dated December 19, 1947, with respect to the Cataract-Pettebone matter.

Mr. Gatchell: I think this is highly misleading, Mr. Examiner, to be put in as an Exhibit without reply.

Mr. Le Boeuf: I have no objection to the reply.

Presiding Examiner: With the reply, do you have any objection to the letter?

Mr. Gatchell: I have objection to both the letter and the reply as not being material, but if the letter is put in as offered by Mr. Le Boeuf, I think that a reply dated January 5, 1948 and signed by J. H. Gutride, Acting Secretary, by direction of the Commission, should also be incorporated.

Presiding Examiner: Is this letter included in your answer, in effect, Mr. Le Boeuf?

Mr. Le Boeuf: Yes, sir.

Mr. Gatchell: No.

Mr. Le Boeuf: Our letter is included.

Mr. Gatchell: Your letter, yes. I beg your pardon. The reply is not. The letter I am referring to is not included in their answer.

Presiding Examiner: Without determining whether or not the entire letter is quoted—

196 Mr. Le Boeuf: (Interposing) The heart of it is included in the answer, Mr. Examiner.

Presiding Examiner: You mean reference to it.

Mr. Le Boeuf: It is the subject matter of one of our exceptions.

Presiding Examiner: Whether such a legal review may be required it is impossible to determine as to materiality. The matter apparently has some relation here, and therefore, for whatever value it has, or whatever materiality it has, the letter appears to be relevant if for no other reason than to supplement the material in the answer so as to know what the matter referred to consists of.

Therefore, it would seem to the Examiner that this should be admitted as Exhibit No. 15, and is, and you may, if you wish—and the Examiner would, in fact, encourage it—your offering the further letter.

(The document above referred to was received in evidence as Exhibit No. 15.)

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Mr. Gatchell: I do not have a copy of that, Mr. Examiner. I had not thought they were to offer Exhibit 15.

May I ask your indulgence and read the letter? It is a very short letter. Or would you rather have me submit it as an Exhibit?

Presiding Examiner: There is no objection to reading it if it is short.

197 Mr. Gatchell: It is dated January 5, 1948. The Niagara Falls Power Company; Buffalo, New York. Attention Mr. A. T. O'Neill, President.

"Gentlemen:

"Receipt is acknowledged of your letter dated December 19, 1947 advising that no application for rehearing will be made from the Commission's Opinion No. 159 and Order issued November 21, 1947 denying application for amendment of license for Project No. 16, and advising that licensee takes the position that it has some right to contest the legal conclusions contained in Opinion No. 159 should the matter arise in some subsequent proceedings.

"You are advised that since the licensee has elected not to seek rehearing and court review, as provided for by Section 313 of the Federal Power Act, the Commission considers that the licensee has waived any further question that it may have had concerning the legal conclusions contained in Opinion No. 159.

"By direction of the Commission.

"/s/ J. H. GUTRIDE,

Acting Secretary."

Presiding Examiner: Does that conclude this detour?

Mr. Le Boeuf: Your Honor asked one question about tying the documents in with the answer. Exhibit 8

198 through Exhibit 14 are all specifically referred to in Appendix "B" attached to the answer.

There is one further matter. We will argue on our behalf that the legal question involved in these two items were settled by the United States Supreme Court in the case of International Paper Company v. United States 282 US 399.

That case—and I should state that Mr. Gatchell will argue to the contrary—arose in connection with a claim against the United States filed by the Paper Company in connection with the taking of these water rights during World War I, and the first decision, therefore, was in the Court of Claims.

Mr. Gatchell: Mr. Le Boeuf, I do not want to interrupt, but are you going to be very long in your explanation of that?

Mr. Le Boeuf: I have finished the explanation. I wanted the Examiner to have a word about it. I just want the Examiner to understand the nature of the order in that case.

The first decision was in the Court of Claims, and from there it went to the United States Supreme Court. I just wanted at this time, in conformity with my understanding of the Commission's rules, to give notice that we would refer, when we come to our brief, to the decisions in both courts and the briefs in both courts.

Mr. Gatchell: It is slightly unusual to refer to briefs in both courts. Do you intend to make those briefs available to the Commission?

199 Mr. Le Boeuf: If desired, we will have them reproduced and made available.

Mr. Gatchell: Mr. Examiner, I certainly object to incorporation in any manner of briefs filed in another case. I do not think they have any bearing on any issues in this proceeding and certainly are not proper as a matter of reference without having been made available to the counsel on the other side.

Mr. Le Boeuf: Mr. Gatchell and I have argued from those briefs so many times, and I assume that they are

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available. But if they are not available we will have them reproduced. They are referred to at pages 21 to 27 of our answer.

I might state this, which I hope will be helpful to the Examiner: The unusual reason for referring to the briefs is to make clear what issues were raised by the respective parties in each of the two courts. That is the only purpose and not as evidence of any fact. The point being we will contend that the issues which the Staff has raised were raised by the briefs of the United States in those proceedings, and therefore are an aid to the interpretation of the Courts' opinions.

Mr. Gatchell: I might suggest to the Examiner that I think we have had a demonstration that we need to have the answer presented first in this case before there is any cross examination of the witnesses so that there may first
200 be a presentation of this entire record of the issues in an orderly manner. I have permitted this digression from the testimony of this witness because I thought it would assist the Examiner in understanding some of those issues. I did not know we were going to get into a legal discussion of a case, as Mr. Le Boeuf says, we have argued many times, and I expect will argue a good many more times.

Mr. Le Boeuf: I might hand to the Examiner a copy of the material to which I previously referred. This happens to be bound in this volume just for our own office convenience, and it also—I should have mentioned—includes the short transcript of the record in that case, which is necessary to understand the situation.

Mr. Gatchell: May I proceed with Mr. Miller?

Presiding Examiner: Let us get this part straight because it does not seem to the Examiner that we quite understand just what may be properly within the record.

So that there is no question about the matter, official notice will be taken of this Supreme Court case, International Paper Company vs. the United States, which is re-

ported in 282 US, beginning at page 399. The Court of Claims matter, the decision, is referred to on page 23 of the Brief, and I assume that would compel reference to that. And "reference" means "official notice", unless it is in the record.

Is that correctly cited as the opinion of the Court
201 of Claims in the International Paper Company vs. United States as 68 Court of Claims 414?

Mr. Le Boeuf: That is correct.

Presiding Examiner: Is there an intervening Circuit Court?

Mr. Le Boeuf: No—directly from the Court of Claims.

Presiding Examiner: Now, you go further and suggest the availability for reference as within the record of certain briefs.

Mr. Le Boeuf: Transcript and the briefs, as set forth—

Presiding Examiner: (Interposing) On page 23 you refer to petition and transcript of record in this Supreme Court case. Is that what you have in mind?

Mr. Le Boeuf: That is true; and it continues thereafter for the following pages up through 27 to make references. You see, our position is that the Staff have referred to this subject matter and that we should have before Your Honor and the Commission the full light for the interpretation of this decision to pass on the question of whether or not it is the controlling matter on the issue which is raised by the Staff Report.

Presiding Examiner: In this volume you have handed me, you have a brief in the Court of Claims?

Mr. Le Boeuf: That is correct.

Presiding Examiner: As a matter of fact, two
202 briefs—one by the Assistant Attorney General, Mr. Galloway, and one by Stetson, Jennings and Russell, on behalf of International Paper Company.

Mr. Le Boeuf: That is correct.

Presiding Examiner: Do you include those, or is that in the transcript?

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Mr. Le Boeuf: No. That is in addition to the transcript. I think Your Honor will find an index there.

Presiding Examiner: That is why I found this situation. Is it your proposal that there be incorporated by reference with the compliance of the regulation, that copies of these be furnished in sufficient number under the regulations for filing, as evidence incorporated by reference under item numbers?

Mr. Le Boeuf: I am perfectly content to do it that way if Your Honor finds it more convenient. My original suggestion was merely to give notice so that counsel and the Examiner and the Commission could take notice of the contents of the decisions, the transcript, the briefs in that proceeding. That is a matter which is done customarily and without any permission. As Your Honor well knows, when you attempt to determine a decision you go to an appropriate law library and dig out the briefs, and I am giving notice of it, and I thought that was all that was required. But I will be glad to go to the expense—

203 Presiding Examiner: It can be noticed. You are correct in that, but there is an element of convenience involved, and I thought you voluntarily suggested procuring that.

Mr. Le Boeuf: I said that if Mr. Gatchell did not have copies available of certain of these documents, we would go to the expense of reproducing them.

Presiding Examiner: Is that necessary, Mr. Gatchell, if these matters have to be reviewed?

Mr. Gatchell: I would think, as Mr. Le Boeuf wants to do it, is the only way to do it—everything in connection with that record, in the record, the motions and whatever else there may be. I do not know what he has in this volume; I have not seen it. But if he is going to make this excursion, of course he may do so in that way. We do not have all the briefs here. I presume we could get them. They are hard to get, however. We went over to the library and looked them up before.

Presiding Examiner: Let's leave the matter this way: That official notice will be taken of this Supreme Court case, and all of the matters in that proceeding, as Mr. Gatchell just stated it better than I can at the moment, and if we run into some practical difficulty in obtaining these, we may have to call on you, Mr. Le Boeuf, as a matter of grace.

Mr. Le Boeuf: Very glad to do so, and I am glad
204 to stipulate if our volume is not complete as to any matter, we will make it complete.

Mr. Gatchell: May I proceed?

Presiding Examiner: You may proceed, Mr. Gatchell.

By Mr. Gatchell:

Q. Mr. Miller—

Presiding Examiner: (Interposing) May I interrupt you just for one moment?

Mr. Le Boeuf, in arguing this matter before the Supreme Court, you would be of great assistance to the Examiner if you would give a little special attention to one element in the decision, which was the finding that the Secretary of War promised to pay the owners, and that the finding also was in the Supreme Court that the Secretary of War proceeded on the footing of a full recognition. I think you understand what I am trying to point up as being of very, very special assistance.

Mr. Le Boeuf: I was trying to wrack my brain. I remember I was interested in the preparation of the briefs, although we were not attorney in that proceeding. I was present in the Supreme Court when it was argued by the then Solicitor General and Mr. John W. Davis.

Does Your Honor ask me to try to recall what was said in that regard?

Presiding Examiner: When you write your brief,
205 if you will simply refer to this request. I think you will see the point of it because that is one of the peculiarities of the case.

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Mr. Le Boeuf: Yes, I remember it very well on the argument.

Mr. Gatchell: I certainly hope, Mr. Examiner, that Mr. LeBoeuf will not go so far as to suggest what was said in oral argument before the Supreme Court. I have never seen him do so, and I do not expect that he will in this case, but I will just express it—

Mr. Le Boeuf: (Interposing) You may like me to do so in this case.

Mr. Gatchell: I might or might not. I don't think it is proper.

Presiding Examiner: You may proceed now. I am sorry for the last interruption.

Mr. Gatchell: Thank you, sir.

By Mr. Gatchell:

Q. Mr. Miller, you have referred very briefly to the adjustments you made by reason of the Pettebone-Cataract water-right claims, and International Paper Company water-right claims. What other adjustments did you make? A. Before we get to that, I want to draw attention of the Examiner that there is a typographical error in this Report (Exhibit No. 1) that, unfortunately, was not caught.

206 Presiding Examiner: Referred to in the answer?

The Witness: Yes, that is the one.

In the third line of the last paragraph, the figure "$31,100" should be "$31,500".

Presiding Examiner: Thank you, sir.

Mr. Le Boeuf: That appears elsewhere in the tabulations, does it not?

The Witness: I think it is correct in the tabulation. I know it is correct in Exhibit No. 2.

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208 Q. On pages 13 through the first line of page 16 you deal with those adjustments in the accounts of

licensee for the period March 1, 1941 through December 31, 1946. By reason of the arrangement with the Buffalo Niagara Electric Corporation in connection with the so-
209 called water rights acquired from the Pettebone-Cataract interests, did you make similar adjustments for the period 1921 through February, 1941? A. No.

Q. Why not? A. It appeared to us that the licensee had made more than a fair return during the first 20 years of operation and the adjustments, if made, would merely have increased the return reflected in schedule No. 2, page 36, for those years. Therefore, it was not necessary to go through the many adjustments for the first 20 years of operation.

Q. On pages 16 and 17 of your report you deal with certain adjustments in the accounts of the licensee for the period March 1, 1941 through December 31, 1946, by reason of certain payments to the International Paper Company. Did you make similar adjustments for the period 1921 through February, 1941? A. No; for the same reasons that relate to the Pettebone-Cataract adjustment.

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210 Q. On pages 27 and 28 of the report, Exhibit 1, you show some rates of return. Do you see that? A. Yes.

211 Q. How did you obtain those rates of return? A. The computation of those rates is shown in Schedule No. 4 appearing at page 44 of the report. This schedule shows the manner in which the base is determined; the operating income is as shown by Schedule No. 3 on page 41; and the ratio of this income to the base is the rate of return.

Q. How did you develop the base upon which the return is computed? A. The base as used herein and as developed by Schedules 4-A, 4-B, 4-C and 4-D consists of the average plant investment less the average reserve for depreciation, plus an allowance for material and supplies and operating expenses as working capital.

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261 **Kenneth A. Miller** was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

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267 Cross Examination

By Mr. Le Boeuf:

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270 Q. Turning to page 13, the summary figures given at the top for the period '41 to '46 there shown. Those figures are after all of the adjustments which you testified to, are they not? A. Yes, sir.

Q. That is, the so-called adjustment in connection with the Pettebone-Cataract water rights? A. And also in respect to taxes.

Q. On page 14, in the last paragraph, second sentence thereof, you refer to the 1925 contract whereby Niagara, Lockport & Ontario Power Company agree to purchase the lands and water rights of Pettebone-Cataract. Were the payments called for in such contract actually made? A. Yes.

Q. And the contract in all respects was performed? A. Yes.

Presiding Examiner: Did not that last answer contain a legal conclusion?

271 Mr. Le Boeuf: I hadn't intended it to. I asked whether the transactions were carried through.

Presiding Examiner: You said, "In all respects performed." That was your question.

By Mr. Le Boeuf:

Q. Was a deed handed over, and was a check actually handed over? A. The contract called for payment of $725,000 in par value of preferred stock plus the assumption of a judgment of approximately $172,000. The stock

was issued in accordance with the terms of this contract, pursuant to a specific authorization by the Public Service Commission of New York, and the payment of the judgment was assumed by Niagara, Lockport & Ontario Power Company, and there was an actual deed made out by Pettebone-Cataract interests in favor of the Niagara, Lockport & Ontario Power Company for the real property. Now, that is as far as I can go.

Mr. Le Boeuf: The reason I asked the question, Mr. Examiner, was the particular wording of that portion of the report referred to a contract being entered into, and while I think there is a fair inference it was executed, the statement was not made.

By Mr. Le Boeuf:

Q. On the bottom of page 15 you referred to the fact that for the purposes of this report, the revenues
272 received from other electric utilities had been increased by $31,500, as corrected, for the 10 months period ended December 31, 1941, and by $37,800 for each of the years 1942 to 1946.

Do you know of any action by the Commission to date with respect to making any order as to the propriety of those annual payments? A. I do not.

Q. Where are those figures to be included in the tabulations at the back of your report? A. I beg your pardon. I did not get that question. (Pending question read.)

The Witness: Turn to page 41, Schedule 3. You will note that the figures in each of the columns for the 10 months ended December 31, 1941, and the calendar years 1942 to 1946 are shown as being taken from Schedules A, B, C, D, E and F. Those are the schedules that are in Exhibit 2—I believe this is Exhibit 2—and there in those exhibits you will see where the adjustments by reason of these payments are made to the figures. In other words, these are just—

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By Mr. Le Boeuf:

Q. Will you identify the line on page 41 where the result of that adjustment is to be found? A. Are you talking of the Pettebone-Cataract alone?

Q. Yes, I am. A. The amounts shown as "Electric Revenues From Other Electric Utilities", and also, "Miscellaneous Electric Revenues" under "Other Electric Revenues" are adjusted.

273

Q. Is the Pettebone adjustment to be found in both of those items? A. Yes. You will recall that in connection with that Pettebone deal, that the Niagara Falls Power Company received $200 a month as a set income from a certain portion of that water, and also received revenues at the rate of $6.70 a KW per year for 2,000 KW. So that in this adjustment I eliminated the revenues which had theretofore been credited to "Miscellaneous Electric Revenues" and increased the revenues from other electric utilities, which makes a net adjustment each year of the—

Q. (Interposing) Of the amounts you specified? A. That is right.

Q. Then you assumed that if that transaction were either terminated or deemed without legal validity, that Buffalo Niagara would have taken the equivalent amount of power under a certain different contract? A. That is right.

Q. You had no basis for assuming that it would be done under that contract, or that a new contract might be made as regards that particular power? A. No. I just assumed that it would have been taken under the terms of the then-existing contracts for all other power, I believe, that it gets, or got from the Niagara Falls Power Company.

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Q. That is a straight, arbitrary assumption? A. That is right.

Q. Of course, the company did not actually receive these amounts which you specified on the bottom of page 15 in the years in question. A. No.

Q. Turning to the IP matter, you are familiar, are you, that the license recites the rights, if any, of the International Paper Company? A. Yes, sir.

Q. Did you investigate the physical situation with respect to the use that IP made of that water in the earlier period? A. Yes.

Q. Could you tell us briefly how it was used, and over what period of time? A. The water was actually used, according to my recollection, by the International Paper Company in its own wheels in the earlier days.

Q. That is it had a branch canal from the power company? A. It drew water out of the canal of the old Niagara Falls Power Company and used the water. Now, just when that—

Q. (Interposing) Is that a direct hydraulic use, or
275 did it generate electricity and use the electricity for operation of its paper mills? A. That originally was hydraulic use. Whether or not International Paper Company converted later I don't recall.

Q. Then at least by the time when the water was transferred to the Niagara Falls Power Company, the plant was electrified and electricity was supplied at the rates that you specify in your report? A. That is right. I think that started in 1919, or somewhere in there.

Q. What is the point of delivery of that power? I mean is it at the power company's bus bar, or is it at the IP plant? A. I don't know.

Q. And the $99,000 was actually paid by the Niagara Falls Power Company during all of the years in question? A. Yes, sir.

Q. And that annual payment has not been the subject of any proceeding by the Federal Power Commission? A. No.

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300 Presiding Examiner: Do you have any evidence in this proceeding, beyond this?

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Mr. Le Boeuf: Yes, sir. I call Mr. Arthur Jackson.

Thereupon, **Arthur W. Jackson** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination

By Mr. Le Boeuf:

Q. Mr. Jackson, where do you reside? A. In Sny-
301 der, New York.

Q. And are you an officer of licensee company? A. I am.

Q. What position do you hold? A. I am the vice president and treasurer of Niagara Falls Power.

Q. How long have you held that position? A. About eight years.

Q. And you are also an officer of the parent company? A. I am.

Q. What position do you hold there? A. The same position that I hold with Niagara Falls Power Company.

Q. How long have you been connected in any capacity with licensee or its affiliated companies? A. About 26 years.

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302 Q. In performance of your official duties, have you responsibility in connection with the accounts and records of the Niagara Falls Power Company? A. I do.

Q. And you have had that responsibility for some period of time? A. Yes, sir.

Q. And you are generally familiar with the accounts and records, and responsible for the accounting
303 practices of that company? A. I am.

Q. Will you turn to page 43 of the answer in this proceeding, entitled "Licensee's Schedule No. 3." This is intended to be compared, is it not, with Schedule No. 3 in the staff report, Exhibit 1? A. That is correct.

Q. Was this prepared under your supervision or direction? A. It was.

Q. What is the starting point shown in the first line? A. The starting point shown in the first line is the Project 16 operating income as shown on the revised staff report dated February 23, 1949, which is now Exhibit 1.

Q. And what is the significance of the adjustment No. 1 which you make to the figures for each of those years? A. Adjustment No. 1 which is the computed revenues in respect to Pettebone-Cataract contract, which have been included in operating revenues of the Niagara Falls Power Company by the staff report—the object of Item 1 in here is to remove from such revenues that item which, of course, we never received.

Q. What is the significance of Item No. 2? A. Item No. 2 restores to operating expenses an item of $82,500 for the 10-month period March 2 to December 31, 1941, and $99,000 for each year thereafter, which was eliminated from operating expenses in Exhibit 1.

Q. What is the significance of Item No. 3? A.
304 Item No. 3 is adjusting Federal income taxes in the years to which certain payments for New York State water charges were applicable which were paid in the year 1946 and were not adjusted to the applicable years in Exhibit 1.

Q. And is the method of making that apportionment set forth on page 44, licensee's Schedule No. 3-T? A. Yes, sir, it is.

Q. And you believe that if such an adjustment was made that that is the correct method of allocation of those tax payments? A. I do.

Q. And you believe that Licensee's Schedule No. 3 correctly shows the results of the three adjustments which you have testified to? A. Yes, sir.

Q. Will you turn to page 45, Licensee's Schedule No. 4, and take the first figured column entitled "Base Note 1"? Would you tell us from what source you derived the figures

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set forth therein? A. The first figured column is the base used in determining the return on the project operation, and the figure is the average plant investment found in Schedule 4-A of the revised staff report. The average of material and supplies from Schedule 4-C of the staff report is 12-1/2 percent of operating expenses as computed
305 by the licensee rather than as used in the staff report.

Q. Now, I would like for you to explain that last detail a little more fully. 12½ percent is the same percentage the staff used. A. We have in effect used the staff's figures computed in that manner. We have, however, adjusted operating expenses by including there the item of operating expense of $99,000 for each calendar year which was eliminated in the staff's computations.

Q. So, you follow the staff's method but you apply another figure which you referred to in Schedule 3? A. That is correct.

Q. What is the source of the second figured column, entitled, "Operating income"? A. The source of that is the Schedule No. 3 which we have just discussed.

Q. And how did you arrive at the rates of return set forth in the third figure column? A. The rate of return is the percentage of column 2 to column 1.

Q. And how did you derive the figures set forth in the fourth figure column entitled, "Specified return 6 percent"? A. That column is merely a computation of 6 percent applied to column 1, with the exception of the first line of figures, which in that case is based on using 5 per-
306 cent rather than 6 percent due to its being a 10-month period.

Q. Now, will you tell me how you arrived at the figures of excesses or deficiencies of operating income over specified return shown in the last figure column? A. The figures shown in the last column are merely the difference between the figures shown in column 2 and in column 4.

Q. And there is one detail there that I think you ought to clarify. For the first year or period, rather, from March 2 to December 31, 1941, you show for that an excess earnings over specified return of $18,272.73, and you show in the rate of return column a return of 5.04 percent, which would seem on superficial examination to be less than 6 percent.

How do you show a plus figure for that year under those circumstances? A. The figure shown in the fourth column, which is headed, "Specified return at 6 percent," I have just qualified, that is in respect to that 10-month period, to the point that it was used as on a basis of 5 percent rather than 6 percent.

And that 5.04 percent in column 3, that is also on a 10-month basis rather than 12.

Q. So the adjustment would be on a 10-month basis? A. That is right.

307 Now, in the last column, have you made these calculations on an annual or cumulative basis? A. Yes, we have.

Q. I do not think my voice carried over the fan. My question is: Did you make the calculations on an annual or on a cumulative basis? A. On a cumulative basis. I am sorry.

Q. And that was on the advice of counsel? A. That is correct.

Q. And the other assumptions contained herein which involve interpretation of the license and the statute are also on the advice of counsel? A. Yes, sir.

Q. On that basis, what is the amount of the amortization reserve as of December 31, 1946? A. At December 31, 1946, as the result of operations of Project 16 computed on the basis which we have here used, it indicates a deficiency for that period of $3,347,078.39.

Q. And on the basis of the adjustments which you have testified to, there would have been a deficiency, would there not, in certain of those years? A. I don't believe I understand that question, Mr. LeBoeuf. In view of the adjustments—what do you have in mind?

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Q. Well, I will withdraw that question. Your answer to the $3,347,000 figure is on the basis of a cumulative
308 application of the statute as your attorney advised? A. That is correct.

Mr. Le Boeuf: Mr. Examiner, I offer in evidence pages 43, 44 and 45 only, of licensee's answer, being entitled Licensee's Schedules No. 3, No. 3-T and No. 4.

Presiding Examiner: Any objection?

Mr. Gatchell: May I ask a few questions?

Presiding Examiner: Yes.

Mr. Gatchell: Thank you.

Cross-Examination

By Mr. Gatchell:

Q. As I understood Mr. LeBoeuf's question to you, when you made the calculations shown on Schedule 4, page 45, you did so upon the advice of counsel. Does that apply to the three schedules shown on these pages? A. It would apply definitely to Schedule No. 3. I would say it would apply to all of them.

Q. Referring to Schedule No. 3, page 43, I can read that first line of figures right out of the Commission's staff report, page 41, Schedule No. 3; but will you tell me where you got the figures that appear under Item 1 of your schedule? A. Those figures also will be found in the staff's report, or Exhibit 1.

Q. Will you show me where?

309 Mr. Le Boeuf: Page 15.

The Witness: Yes, sir. Page 15, last paragraph, there is the figure of $31,500 with a 10-month period which is shown on our Schedule 3.

By Mr. Gatchell:

Q. $37,800 for— A. For each of the years thereafter.

Q. Now, as I understand it, you have merely made the mathematical computation that those items should be deducted, and you have made the deduction from the operating income? A. That is correct.

Q. Then, Item 2. Where did that come from? A. Item No. 2 will be found on page 16 of the staff report.

Q. Now, on Item No. 3, where did you get those figures? A. The figures shown under Item No. 3 will be found on Licensee's Schedule No. 3-T.

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310 I have spread here, as you will see, the tax liability computed on the 1946 rate to 1943, 1944 and 1945 on the ratio of the water payment in each of those years.

Q. Now, how were your income-tax returns filed. A. Our income-tax returns themselves, naturally, the payment would be included in the year 1946, or in 1946's tax return.

311 Q. Then you are not suggesting that your tax for these years 1943, 1944 and 1945 would be reduced by the amount shown on Schedule 3-T? A. We are suggesting that, for this purpose, yes.

Q. But not as a matter of income-tax payments to the Bureau of Internal Revenue? A. That is correct.

Q. Now, in Schedule No. 4, in order to work this through, Mr. Jackson—I do not want you to repeat unnecessarily but I am not an accountant, as you have found out before this. Would you mind starting with your first figure there in the base for the period March 2 to December 31, 1941, and tell me how you derive that figure? A. Well, the base in the first column of figures will be found—that is, we start out with the average plant investment, which will be found in Schedule 4-A of the revised staff report.

Q. That is right and that figure— A. And to that figure we add the average material and supplies.

Q. Which you take from 4-C? A. From 4-C.

Q. That is right. A. We then use the same percentage in determining the operating expenses as used in the staff report, which we have adjusted to include in there $99,000

312 for each calendar year, thereby first increasing our working capital as result of increasing operating expenses, and this is the same report—or the same

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figure as determined by the staff with the exception of the adjustment for working capital.

Q. Now, this $99,000 comes from where? A. It comes—it will be found on our Licensee Schedule No. 3 or on page 16 of the staff report.

Q. As the payment made by the licensee to the International Paper Company? A. That is correct.

Q. When was that payment made? A. When was it made?

Q. Yes, sir, what time of the year? A. That I couldn't say, off-hand.

Q. Was it a monthly payment or annual payment? A. I think, as I recall, it was made twice a year.

Q. Now, was it made in advance or after, at the end of the period? A. I couldn't answer that without checking.

Q. Well, you are the treasurer, but you can not tell us whether that payment was made from the revenues of the company or not? A. Whether it is made from the revenues of the company?

Q. Is it credited to the revenues of the company, I mean.

A. No, it is charged to operating expenses. You
313 mean—

Q. I know that. I beg your pardon. A. Do you mean, do we make that payment out of revenue received from the sale of power?

Q. Yes, sir. A. Yes, we do.

Q. But not for that same period? A. Not necessarily. We make the payment out of our cash that is available for that purpose.

Q. Well, you bill the company for power sold, do you not? A. Yes, sir.

Q. And there is an offset to that bill? A. No, they are billed each month the same as any other customer of the Niagara Falls Power Company, under its tariff. They pay their power bill as rendered monthly.

Q. And this is a separate transaction that you pay them? A. That is correct.

Q. And you can not tell us definitely—you think it is on a semiannual basis, a semiannual payment, but you can not

tell us if it is paid in advance or not. A. Of that I am not sure.

Q. Well, let me ask this. If that payment is collected for the International Paper Company at the end of the six months' period in which it is applicable, you then have not advanced anything from your funds for the use of
314 that water for that period, have you? A. I am afraid I don't understand that one.

Q. Well, you pay for water; that is what you are paying for? A. That is right.

Q. And if you used it for six months and then paid for it, you would have the use of that water, have you not? A. That is correct.

Q. All right. Now, do you receive your payments for power from this company and all others on a monthly basis? A. We do.

Q. For the power used during the preceding month? A. That is correct.

Q. So that during the first month of such a period when you are paying the International Paper Company on a six-month basis, you have had the revenue from the power generated by the water which you have not paid for, is that correct? A. Now, I am afraid I don't understand you. I don't see any connection between what we collect from the Paper Company for the sale of power and what we pay them for the purchase of water. That is, we don't use the water we purchase from the Paper Company to produce power that we in turn send back to them. There isn't that close a connection.

Q. What do you use that water for? A. We use it to generate power.

315 Q. And whom do you sell that power to? A. Well, I wish I could earmark it.

Q. You sell it to all your customers; it goes into the pool? A. That is right.

Q. And from that which is sold, at the end of each month you collect from the customers you have sold to during that month? A. That is correct.

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Q. Now, if your payment is on a six-months' period, as you say, during the first of those six months if you have not paid for that water, you have received the use of that water and have sold that power that you have generated from that water to all your customers indiscriminately and you have received a revenue from that, have you not? A. That is correct.

Q. So that you are then ahead that revenue by at least five months of that six-month period, are you not? A. I don't understand what you mean by being ahead that revenue. In other words, we produce power—

Q. You had the use of that money for five months before you had to pay anything to the International Paper Company? A. That is true, assuming, of course, that it is on a semiannual basis and also that it is not payable in advance.

Q. You don't know the answer to either of those?

316 A. I can not tell you.

Q. Does anyone here know? Are there records here to show? A. I could not tell you whether any of the records are available here or not.

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Mr. Le Boeuf: Perhaps the witness ought to be allowed to refresh his recollection from Exhibit 14 in this proceeding, which may give him an answer to the question of when the payments were made, as shown on page 7. (A document was handed the witness.)

The Witness: Do you want me to read this?

By Mr. Gatchell:

Q. No. I want you to give the answer as to when payment was made to the International Paper Company, if you can. A. Well, it is indicated on page 7 of Exhibit 14 in this proceeding. This agreement provides that the an-

317 nual amounts so to be paid by lessor shall be payable monthly in equal installments on the first day of each month beginning with a payment on September 1, 1937, in respect of the month of August 1937.

Q. So that it is paid monthly at the end of the month? A. That is correct.

Q. Now, this agreement that you have referred to, Exhibit 14, merely specifies what should be done, does it not? A. I would say it was done.

Q. Well, you mean you now know— A. I would say yes, I know.

Q. Well, what has changed here to give you the knowledge? A. I believe I stated before that I did not have knowledge; I was speaking from the best recollection.

Q. You have not examined the books of the licensee, have you? A. I am afraid I don't understand your question.

Q. Since you said you did not know how this payment was made, that it might have been on a semiannual basis, you have not examined the books of the licensee? A. No. I am assuming that we do—that it is the same here as in every case, that we live up to agreements when we enter into them.

Q. So, you are merely assuming you do carry out this particular agreement? A. I don't have the books of the
318 company with me, so I can not point out definitely; but we have done it.

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319 Mr. Gatchell: My objection to Licensee's Schedule No. 4 is that it started out with a rate base, with a plant investment base, rather, which shows as stated by the witness not only the actual investment plus an allowance for working capital, but an allowance for 12½ percent of the sum of $99,000 said to have been paid to the International Paper Company which was called for by their contract to be paid on a monthly basis; but this witness is not able to tell of his own knowledge, and he is the treasurer, whether the payment actually was made; and I think until that is established that the evidence has not been properly proven.

And, furthermore, your Honor, the first column upon which—of Schedule 4—upon which the entire schedule is

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predicated is not the computation of this witness but
320 is based upon a legal conclusion that depreciation should not be deducted and no foundation has been laid for that legal conclusion.

Mr. Le Boeuf: Mr. Miller testified that the $99,000 was paid when I asked him that question this afternoon. I do not think this needs to be argued. As your Honor stated when Mr. Gatchell offered Exhibit 1, that it was evidence of a method of computation based on certain legal conclusions.

Presiding Examiner: The exhibit is admitted as Exhibit No. 20, Exhibit 19 having been reserved for another paper, that is that memorandum.

These three exhibits, Licensee's Schedules No. 3, Schedule No. 3-T and Schedule No. 4, are considered as part of the same exhibit.

(The documents referred to, Schedules Nos. 3, 3-T and 4 of Licensee's Answer, were received in evidence.)

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345 (Whereupon, at 5:30 o'clock p.m., the hearing in the above-entitled docket was adjourned and concluded.)

EXHIBITS.

Hearing Exhibit No. 8.

563 Niagara County, ss.

Recorded on the 13" day of October A. D. 1891 at 10 o'clock A. M., in Liber 209 of Deeds at page 364 and examined.

PAUL CARROLL,
Clerk.

564 THIS INDENTURE, made the first day of September, 1891, between THE NIAGARA FALLS POWER COMPANY, a corporation organized and existing under the laws of the State of New York (hereinafter called Niagara Company), Lessor, party of the first part, and THE SOO PAPER COMPANY, a corporation organized and existing under the laws of the State of Illinois (hereinafter called the Soo Company), Lessee, party of the second part,

WITNESSETH, that in consideration of the rents and agreements hereinafter reserved and contained on the part and behalf of the Soo Company, its successors and assigns, to be paid, kept and performed, the said Niagara Company has granted, demised, let, and by these presents does grant, demise and to farm let unto the said Soo Company, its successors and assigns,

ALL THAT CERTAIN LOT, PIECE OR PARCEL of land and land under water in the town of Niagara, County of Niagara, and State of New York, being a part of lot number eleven, Steadman Farm, so called, more particularly described as follows:

Beginning at a point in the southerly line of Buffalo Street, where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so called), running thence South eighty-eight (88) degrees and forty (40) minutes East magnetic, along said southerly line of Buffalo Street, seven hundred and ninety-three and three-tenths (793.3) feet to a stone monument set in said south-

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erly line; thence South four (4) degrees and sixteen (16) minutes West magnetic six hundred and eighty-seven (687) feet, and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River; thence by curve to the Southwest with radius of one hundred (100) feet one hundred and ninety-five and
565 five-tenths (195.5) feet; thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes East magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hundredths (11.75) acres of land and land under water, more or less; together with three thousand horse-power of the power hereinafter described to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging; the following being a plan of such demised premises showing the proposed point of water in-take and other appurtenances:

566 To Have and to Hold the described premises to the said Soo Company, its successors and assigns, to its and their use and behoof until and including the thirty-first day of March, A. D. 1936, subject to the agreements, terms, conditions and all other matters and things hereinafter set forth as obligatory upon the Lessee, and among other things, to the payment to the said Niagara Company, its successors and assigns, of an annual rental of twenty-four thousand dollars in gold coin of the United States of the standard of weight and fineness of the year 1890, or the equivalent of this commodity in United States currency, at the option of the Lessor, payable in equal quarterly installments; payment of six thousand dollars in gold coin, such as specified, or its equivalent as specified, to be made on the thirty-first day of December, 1892, and a like payment to be made every three months thereafter, viz.: on the last day of every March, June, September and December, until the expiration of the demised term.

THE NIAGARA COMPANY, for itself, its successors and assigns, covenants with the said Soo Company, its successors and assigns, that the said Niagara Company is lawfully seized in fee of the above-granted land; that it has good right to lease and demise the same as aforesaid; that the same, excepting as hereinafter mentioned, is free of all incumbrances, and that it will warrant and defend the same against the lawful claims and demands of all persons, and that said power hereby demised shall be maintained as hereinafter provided during the demised term, and that the Lessee, on paying the said yearly rent and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises for the term aforesaid and for any extension thereof hereinafter made in accordance with the provisions of this agreement.

THE NIAGARA COMPANY reserves unto itself, its successors and assigns, the right, at all reasonable times, to enter into and upon the demised premises, for the purpose of inspecting or repairing any canals, tunnels, water courses, water ways or other appurtenances belonging to it or connected with its works, and of removing obstructions therein, as well as to measure and compare the quantity of water used and wasted, or suffered to flow out and waste, with the quantity hereby granted.

567 THE NIAGARA COMPANY further reserves to itself, its successors, agents and assigns (this reservation being a limitation and condition of this demise) a right, privilege and easement (subject to the lien of the mortgage or deed of trust hereinafter mentioned), to construct, establish and maintain upon, through or under said lands without unnecessarily impairing the use and enjoyment thereof by the Lessees thereof, any tunnels, conduits, sluice-ways, pipes for air, water, gas or sewers, wires or machinery for the creation and transmission, distribution and application of power, heat or light created by or

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through the use or operation of any tunnel of the Niagara Company or of any extension thereof, together with any reasonable and proper highways and tracks, switches and sidings for a terminal railroad; provided that no such reserved right shall be exercised without subsequent fair and reasonable compensation to the Lessees for any damage done by reason of the exercise of such right, privilege or easement. Such compensation shall be ascertained and fixed by arbitration in the manner hereinafter provided.

THE SOO COMPANY, for itself, its successors and assigns, hereby covenants with the Niagara Company that it and they will keep, fulfill and observe, all and singular, the covenants, stipulations and conditions herein contained or referred to on its or their part to be kept, performed and fulfilled; and that it will pay, or cause to be paid, the rent hereinbefore reserved to be paid at the times and in the manner hereinbefore mentioned.

THIS LEASE IS MADE AND ACCEPTED UPON THE FOLLOWING CONDITIONS AND COVENANTS, to wit:

ARTICLE I. The said premises shall be used by the Lessee, its successors or assigns, for the purpose of manufacture [without nuisance] as hereinafter provided.

ARTICLE II. The Lessor shall furnish and maintain for the use of the Lessee, during twenty-four hours of every day of the year during said term (excepting Sundays and holidays, and not more than ten other days in every year; on all of which days, however, the Lessee may use the power without further charge, if the Lessor shall not shut the same off for purposes of maintenance or repair; rent to be waived for any other days of suspension) a full and sufficient right and opportunity (always excepting any interference from ice) to take water from the Ni-
568 agara River at a point opposite the said demised premises, or, at the option of the Lessee, from the

main canal of the Lessor at the point nearest the demised premises, and to discharge into the main tail-race or tunnel of the Lessor through a branch tail-race or tail-races to be constructed at the cost of the Lessee and in conformity to the plans of the engineers of the Lessor and to their decision, 300 cubic feet of water per second when the fall available on said property shall be 120 feet and a quantity inversely proportionate to this fall of 120 feet if the said available fall be more or less than 120 feet (such 300 cubic feet per second being herein held to be the equivalent of 3,000 horse-power on the shaft); such water so discharged to be continuously carried away, as aforesaid, during said term through the main tunnel of the Lessor at its expense.

It is understood and expected that the Lessor will be able to furnish such opportunity for discharge of water on or before October 1, 1892, but, should it prove otherwise, the Lessor shall not be chargeable for or on account of delay, except that no rent shall be payable hereunder for any period until such opportunity for discharge of water shall be actually furnished by the Lessor.

Article III. For the purpose of ascertaining the quantity of water drawn or suffered to flow out of the Niagara River or out of the canal or canals of the Lessor through the demised premises or into the tunnel of the Lessor by the Lessee, its successors and assigns, the Lessor reserves the right, from time to time, as it may desire, by its duly authorized agent, hydraulic engineer or other employee, and with the necessary workmen or assistants, to enter upon the demised premises, to measure and compare the quantity of water drawn or suffered to flow upon or through the demised premises, with the quantity granted, and may also adopt and use such other mode of making or of verifying the said measurements as the circumstances of the case may require; and the Lessee shall at all times furnish all reasonable facilities to said employees and as-

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sistants in thus ascertaining the quantities of water drawn or discharged as aforesaid.

ARTICLE IV. The Lessor shall construct and keep in good repair the main tail-race tunnel, and from time to time, as occasion may require, shall remove and clear out obstructions that may accumulate therein, always excepting ice.

The penstocks, canal, cross tunnel, flumes, wheel-
569 rooms, wheel-pits and other water connections, as well as wheels, shall be made, maintained, belong to and be kept in good repair by the Lessee, and the water in-take shall be joined to the Niagara River or to the Lessor's water course by the Lessee in a durable, substantial and water-tight manner. The Lessee shall also make and maintain a good and substantial stop-gate at the head of each water in-take, which shall be so constructed that when requisite it may be closed, whether the water be then passing through the in-take or not, and that when closed it will shut out the water from the said in-take. The Lessee shall construct said penstocks, flumes, wheel-rooms and other water connections so that the water may be shut out from them without injury to them.

All the work contemplated in this Article shall be done according to plans bearing the approval of and in manner satisfactory to the Engineers of the Lessor.

ARTICLE V. If the Lessee shall sustain any injury happening from the willful neglect or misconduct of the Lessor, the rent for the right or privilege injured may cease during the time such injury shall continue, but no longer.

ARTICLE VI. The Lessee shall not use more water than granted, nor waste it, nor permit it to be wasted for want of repair, or through the deficiency of its works or otherwise; and if so wasted, or if more be used than is granted, the Lessor may stop the water from entering the flumes by closing, locking and sealing the gates across them, or by any other method, until such waste or excessive use be sufficiently guarded against.

ARTICLE VII. All buildings erected upon the demised premises more than ten feet in height shall be of stone or brick, the roofs covered with slate or some incombustible substance, and the covings well secured against fire; and if any other be erected the Lessor or its assigns may enter and abate them, and have any other appropriate remedy.

ARTICLE VIII. The demised premises shall be held, used and improved for mills, manufactories or buildings appurtenant thereto, or for such dwelling houses, boarding houses, sheds and other outhouses as shall be required for the accommodation of the owners, agents, clerks, overseers, machinists, watchmen or operatives employed in such mills, and shall not be appropriated to any other purpose whatever, nor transferred, sold or alienated, except subject to all the conditions and restrictions of this lease.

ARTICLE IX. The Lessee shall not use any building for any purpose, nor set up or continue any laboratory, powder mill, furnace or forge, or any chemical or other works whatever, which may be so noxious or dangerous, from fire or otherwise, as to impair, injure or endanger the life, safety, health or reasonable comfort of any person living or employed in and about the land or works of the Lessor, or which shall endanger any buildings, property or works placed by the Lessor, or others, upon lands owned, granted or demised by the Lessor. In case any such prohibited works shall be set up, continued or used, the Lessor may take judicial proceedings to abate them, and also may sue for damages, and may stop the water, as above mentioned, from passing into the flumes or canals of the Lessee until such prohibited works be removed or discontinued.

Neither shall the Lessor set up, continue or use any such prohibited works on its land so near that of the Lessee as to cause the above-described mischiefs, or either of them; and should any such prohibited works be set up, continued or used by the Lessor, the Lessee may take judicial proceedings to abate the same.

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Provided, however, that the foregoing agreement to prevent nuisances is not to be understood to prevent any party from building, using and maintaining machine shops, with the smiths' forges, hammers and other things necessary and pertaining thereto, for making all kinds of machinery, nor to prohibit any party from setting up, using, enlarging or improving any establishment for bleaching, dyeing, coloring or printing goods, with all things necessary therefor (excepting dangerous or noxious works as aforesaid), and no party shall have the right to object to the use of any building for the purposes for which it has been used before or at the time of the acquisition of his or its rights, or to object to any building previously erected, on account of the materials of which it is composed or the manner in which it may be built.

The demised premises and all works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the works of the Lessor, and especially any and all obstruction or pollution of the water of the Niagara River, from which,
571 near Grass Island, the Lessor intends to draw water for domestic and other purposes.

Article X. The demised premises and the works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the Hydraulic Canal of the Niagara Falls Hydraulic Power and Manufacturing Company as provided in an agreement between that Company and the Niagara Company, dated the 30th day of December, 1889, and recorded in the office of the Clerk of Niagara County on the 18th day of January, 1890, in Liber 198 of Deeds, at page 9.

Article XI. The respective successors or assigns of the parties are declared to be entitled to all the rights, advantages and forfeitures, and bound by all the obligations, duties and conditions of, and remedies against, their original parties respectively, as herein set forth, unless otherwise expressed.

ARTICLE XII. The Lessor reserves the right to draw off the water from the canals, or tunnels, or of closing the same temporarily, for the purpose of clearing out, or removing obstructions therein, or of repairing the same, and also, whenever necessary, for the purposes of prosecuting and continuing the operations of the Niagara Company, its successors and assigns, in the building of mills and constructing the water works connected therewith, in the way usually done in similar cases, and with as little interruption in the use of water power as the circumstances and nature of the case may admit.

ARTICLE XIII. The power to be developed as aforesaid shall not be used elsewhere than on the demised premises, nor shall it be let or assigned on said premises to any other person at any price less than that which at the time may be charged by the Lessor for similar blocks of power for similar purposes; but no such transfer shall release any party claiming hereunder from any obligation of this lease, unless nor until such transfer shall have been approved and such transfer accepted by written instrument executed by the Lessor (with the approval of the Trustee under said mortgage), specifying the fact and extent of such release.

ARTICLE XIV. The Lessee shall have in all roads surrounding the said premises the same rights as any and all other takers of power from the Lessor, which, however, does not hereby covenant or agree to construct or provide any roads other than those now in existence. The
572 Lessee shall also have the right to cross the proposed outer road if constructed, with a canal over which it shall construct and maintain a sufficient bridge, and shall also have the right of dockage in front of the demised premises and along the proposed outer road, if constructed.

ARTICLE XV. The Lessee shall bear and pay all taxes, assessments and public charges (including charges for

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water), ordinary or extraordinary, levied or accruing against the said property during the demised term, or any extension thereof.

ARTICLE XVI. This lease and agreement is in all respects subject to the reservations, limitations and conditions contained in a certain mortgage or deed of trust made by The Niagara Falls Power Company to The Central Trust Company of New York, as trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29, 1891, and was recorded in the Niagara County Clerk's Office April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office, July 14th, 1891, in Liber 211 of Mortgages at page 549.

ARTICLE XVII. The Lessee shall pay all the rents herein reserved to the Lessor as herein provided until January 1, 1895, and also during the remainder of the demised term or any extension thereof until and unless default shall have been made by the Lessor in payment of some part of the principal or interest secured by the mortgage above mentioned and notice of such default shall have been received by the Lessee; and in case of, and after any such default and so long as the same shall continue, then upon and after such notice shall have been received by it, the Lessee shall punctually pay all rents accruing hereunder directly to the Trustee under the said mortgage for the benefit of the bondholders.

ARTICLE XVIII. The Lessee shall, within a reasonable time, fill in or otherwise improve the said lands under water above mentioned, and shall construct a sufficient canal, tunnel, wheel-pit and wheels for the development on said land of three thousand horse-power (or, if a second installment be called for as hereinafter provided, six thousand horse-power) at its own expense, but according to

the plans and under the directions of the engineers of the Lessor.

573 PROVIDED, HOWEVER, AND THIS LEASE IS UPON THE EXPRESS CONDITION THAT (1) if it shall happen that the said rent, or any part thereof, shall not be paid on any day on which the same ought to be paid as aforesaid; or (2) if any other moneys payable by the Lessee shall not be paid upon any day when the same ought to be paid; or (3) if it shall happen that the Lessee, its successors or assigns, shall fail to keep or shall violate any other condition or covenant herein contained, then, and in every such event, such default or violation may be notified to the Lessee by the Lessor, or by the Trustee of the mortgage aforesaid, and if such default or violation shall continue for sixty days after such notice thereof shall have been given either by mailing the same at the post office in Niagara Falls or by posting the same in a conspicuous place upon the demised premises, then, and in every such event, it shall and may be lawful to and for the Lessor, its successors and assigns, into the said demised premises or any part thereof in the name of the whole, to reenter and to repossess, have and enjoy the same again as of their first and former estate and interest therein, anything herein contained to the contrary notwithstanding, and no waiver of any such right of reentry at any time shall affect or waive any right of reentry accruing subsequently to such waiver.

IT IS HEREBY MUTUALLY COVENANTED AND AGREED that if the said Lessee, its successors and assigns, shall have well and faithfully kept all and every the covenants and conditions herein contained on its and their part and behalf, then the said Lessor:

(1.) At any time on or before the 1st day of July, 1894, at the request of the Lessee, its successors or assigns, shall and will enter into a further agreement in terms similar to this, giving to said Lessee, its successors or assigns, a

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right to discharge into the tunnel of the Lessor from the demised premises an additional amount of water equal to that above stated, at an annual rental therefor of Thirty Thousand Dollars, in gold coin as above specified (in addition to the rent herein before reserved), payable during the whole of the remainder of the demised term, in quarterly installmnts as above specified.

(2.) At the expiration of the term hereby granted, upon the written request of the Lessee fully stating the
574 proposed terms of renewal, and served on or before January 1st, 1935, shall and will grant a new lease to the said Lessee, its successors or assigns, for a further term of fifty years, to begin at the expiration of the term hereby granted, upon reasonable terms (not less favorable to the Lessor than those herein stated, and subject to the reservations, limitations and conditions of the mortgage aforesaid, if then outstanding), to be settled by arbitration as hereinafter provided in case of disagreement between the parties, provided, however, that the Lessor shall then by extension of its corporate existence or otherwise have power to give such further lease; and in default thereof the Lessee shall be entitled to purchase such property at a price (not less than four thousand dollars per acre) to be fixed by arbitration, improvements not to be taken into account.

Whenever an Arbitration shall become necessary under the provisions of this lease, the same shall be established and conducted as follows: The Lessor, its successors or assigns shall nominate one fit and impartial person, and the Lessee, its successors or assigns, shall nominate one other fit and impartial person, which nominations shall be made and signified in writing by each party to the other; and in default of such nomination by either party for the space of thirty days after request for such nomination shall have been duly communicated in writing to such party by the other party, the person who shall have been so nomi-

nated by the other party shall appoint and associate with himself one other fit and impartial person; and if the persons so nominated or appointed shall differ in judgment as to the subject of decision by them, they shall appoint a fit and impartial person to be associated with them for such purpose, if they can agree on such person, or if they cannot so agree then each of them shall nominate two fit and impartial persons, and from the names of the four persons so nominated that of one of them shall be drawn by lot, who shall be associated for the purposes aforesaid with the said two persons previously so respectively nominated or appointed; and the decision under oath of any two of the three persons who shall be so nominated or appointed shall in all cases be binding and conclusive. If, after any nomination of an arbitrator as hereinbefore provided duly made, a person so nominated shall for any reason be unable or shall decline to serve as such arbitrator, or shall be objected to by any party, the party hereto so nominating the person so becoming unable or declining to serve, or being objected to by the other party, shall at his option have the right to substitute some fit and impartial person qualified as aforesaid as arbitrator in the place and stead of the person unable or declining to serve or being objected to, provided that no person chosen by the other two arbitrators or by lot as above contemplated shall be subject to such objection.

And Inasmuch as this is and is intended to be the corporate obligation of the two parties hereto respectively, their successors and assigns, any and all individual liability of the stockholders and trustees or directors of either and each of the corporations parties hereto is hereby expressly waived, and no party or person claiming hereunder shall at any time or place allege or assert any such individual liability in respect of any obligation or default under this agreement or any judgment thereon, and no recourse thereon shall be had against any such stockholder, trustee or director.

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In Witness Whereof the parties hereto have caused these presents to be signed by their respective Presidents, and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries, the day and year first above written.

The Niagara Falls Power Company,
By Charles B. Gaskill,
President.

(Seal)
Attest,

Alexander J. Porter,
Secretary.

The Soo Paper Company,
By John L. Norton,
President.

(Seal)
Attest,
W. G. Norton,
Secretary.

[Acknowledgments and County Clerk's certificate omitted from printing.]

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578 CONSENT OF TRUSTEE.

Central Trust Company of New York, Trustee under a certain mortgage made and executed to it by The Niagara Falls Power Company, a corporation organized and existing under the laws of the State of New York, which mortgage is dated April 29, 1891, and recorded in Niagara County Clerk's Office April 30, 1891, in Liber 211 of Mortgages at page 363, and also Trustee under the mortgage confirmatory thereof, does hereby consent that the within lease of a portion of the premises subject to the lien of said mortgages be executed by The Niagara Falls Power Company at the rentals and upon the conditions therein set forth, subject, nevertheless, to the limitations, restrictions and conditions in such case made and provided in said mortgage dated April 29, 1891, and particularly in Article III thereof.

In Witness Whereof said Central Trust Company of New York has caused this consent to be signed by one its Vice-Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, the 19th day of September 1891.

Central Trust Company of New York,
By E. Francis Hyde,
2d Vice-President.

Attest.
C. H. P. Babcock,
Secretary.

(Corporate Seal)

[Acknowledgment and County Clerk's certificate omitted from printing.]

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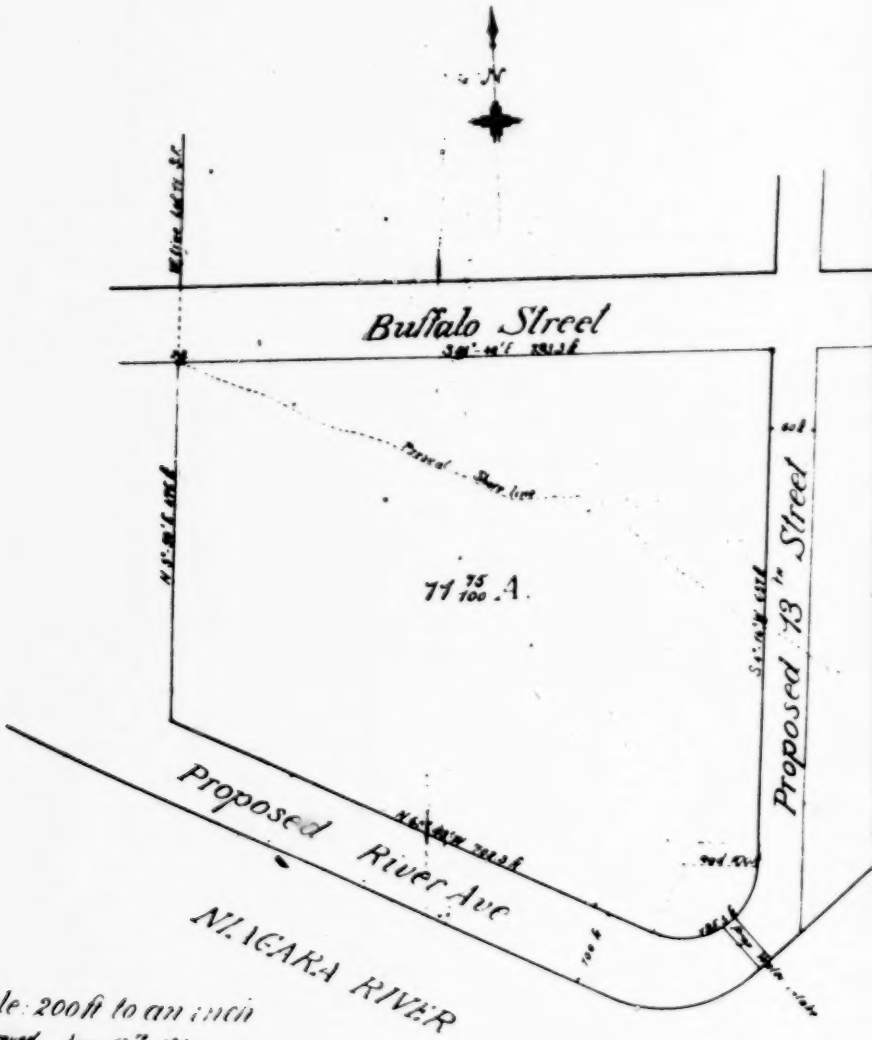

ale: 200 ft to an inch

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Hearing Exhibit No. 9.

581 THIS INDENTURE, made the Seventh day of March, 1896, between THE NIAGARA FALLS POWER COMPANY, a corporation organized and existing under the laws of the State of New York, (hereinafter called "Niagara Company"), party of the first part, and NIAGARA FALLS PAPER COMPANY, a corporation organized and existing under the laws of the State of Illinois, and authorized to do business in the State of New York, (hereinafter called the "Paper Company"), party of the second part,

WITNESSETH, That the said party of the first part in consideration of the agreements and covenants hereinafter contained to be kept and performed by the party of the second part and of the sum of One Dollar, lawful money of the United States, paid by the party of the second part, the receipt whereof is hereby acknowledged, and of other good and sufficient consideration it thereunto moving does hereby grant and release unto the said party of the second part, its successors and assigns forever

ALL THAT CERTAIN LOT, PIECE OR PARCEL of land and land under water in the City of Niagara Falls, County of Niagara and State of New York, being a part of lot number eleven, Steadman Farm (so called), more particularly described as follows:—

BEGINNING at a point in the southerly line of Buffalo Street, where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so called), running thence South eighty-eight (88) degrees and forty (40) minutes East magnetic, along said southerly line
582 of Buffalo Street, seven hundred and ninety-three and three-tenths (793.3) feet to a stone monument set in said southerly line; thence South four (4) degrees and sixteen (16) minutes West magnetic six hundred and eighty-seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River; thence by curve to the Southwest

with radius of one hundred (100) feet one hundred and ninety-five and five-tenths (195.5) feet; thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes east magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hundredths (11.75) acres of land and land under water, more or less; together with three thousand horse power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging; the following being a plan of such demised premises showing the point of water in-take, wheel-pit, discharge tunnel and other appurtenances.

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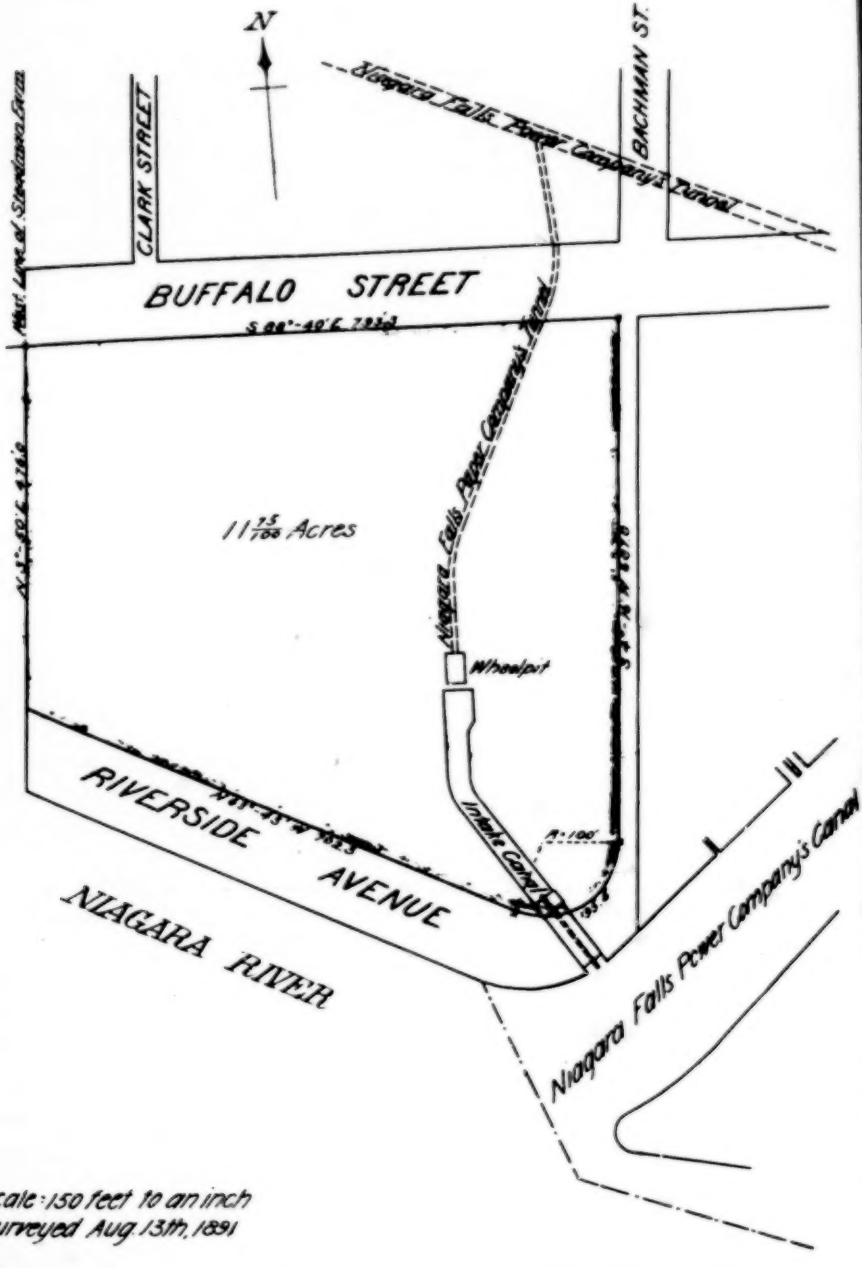
N
BACHMAN ST.
Niagara Falls Power Company's Tunnel
CLARK STREET
West Line of Stonehouse Farm
BUFFALO STREET
S 88°-49' E 791.8
N 1°-52' E 411.8
11 25/100 Acres
Niagara Falls Power Company's Tunnel
Wheelpit
Intake Canal
RIVERSIDE AVENUE
NIAGARA RIVER
Niagara Falls Power Company's Canal
Scale: 150 feet to an inch
Surveyed Aug. 13th, 1891

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584 Being the same premises heretofore demised by the party of the first part to the party of the second part, by a certain indenture of lease, dated September 1st, 1891, and recorded in Niagara County Clerk's Office October 13th, 1891, in Liber 299 of Deeds, at page 364;

Excepting and Reserving Therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo Street, and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls Power Company by deed dated June 11, 1892, and recorded in the Niagara County Clerk's Office June 29th, 1892, in Liber 265, at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's Office, June 11th, 1892;

And Also Excepting and Reserving Therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Paper Company to connect with the main tunnel of the Niagara Company, in which branch tunnel, however, the Paper Company, its successors and assigns, shall have the sole right of exclusive use for its and their own purposes, so long as it and they shall continue to pay the rental hereinafter specified for the right to take, use and develop water and water-power to the extent of Three thousand (3,000) Horse Power, and all other conduits, sluice-ways, wheel-pits and tunnels of the Niagara Company.

585 To Have and to Hold the above granted premises to the said party of the second part, its successors and assigns, forever, but nevertheless, (and this grant not being intended to prevail against any provision hereinafter contained, though apparently in some degree repug-

nant thereto) subject to the reservations and to the agreements, terms and conditions and all other matters and things hereinafter set forth as obligatory upon the party of the second part, and among other things, to the payment to the said Niagara Company, its successors and assigns, as an annual rental for the right to take, develop and use upon the premises hereby granted, water and water power sufficient to produce Three thousand (3,000) Horse Power as hereinafter defined, of Twenty-four Thousand Dollars in gold coin of the United States of the standard of weight and fineness of the year 1890, or the equivalent of this commodity in United States currency, at the option of the party of the first part, payable in equal quarterly installments; payment of Six Thousand Dollars in gold coin, such as specified, or its equivalent as specified, to be made on the thirtieth day of June, 1896, and a like payment to be made every three months thereafter, viz.: on the last day of every March, June, September and December in each year thereafter.

The Niagara Company, for itself, its successors and assigns, covenants with the said party of the second part, its successors and assigns, that the said Niagara Company is lawfully seized in fee of the above-granted land; that it has good right to convey the same as aforesaid; that the same, excepting as hereinafter mentioned, is free of
586 all incumbrances; that the party of the first part will execute or procure any further necessary assurance of the title to said premises; and that it will warrant and defend the same and the estate therein as hereby conveyed against the lawful claims and demands of all persons; and that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided; and that the party of the second part, on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever.

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THE NIAGARA COMPANY reserves, however, unto itself, its successors and assigns, the right, at all reasonable times, to enter into and upon the demised premises, for the purpose of inspecting or repairing any canals, tunnels, water courses, water ways, or other appurtenances belonging to it or connected with its works, and of removing obstructions therein, as well as to measure and compare the quantity of water used and wasted, or suffered to flow out and waste, with the quantity hereby granted.

THE NIAGARA COMPANY further reserves to itself, its successors and assigns (this reservation being a limitation and condition of this conveyance) a right, privilege and easement (subject to the lien of the mortgage or deed of trust hereinafter mentioned), to construct, establish and maintain upon, through or under said lands without unnecessarily impairing the use and enjoyment thereof by the grantee thereof, any tunnels, conduits, sluice-ways, pipes for air, water, gas, or sewers, wires or machinery for the creation and transmission, distribution and
587 application of power, heat or light created by or through the use or operation of any tunnel of the Niagara Company or of any extension thereof, together with any reasonable and proper highways and tracks, switches and sidings for a terminal railroad; provided that no such reserved right shall be exercised without subsequent fair and reasonable compensation to the grantee for any damage done by reason of the exercise of such right, privilege or easement. Such compensation shall be ascertained and fixed by arbitration in the manner hereinafter provided.

THE PAPER COMPANY, for itself, its successors and assigns, hereby covenants with the Niagara Company that it and they will keep, fulfill and observe, all and singular, the covenants, stipulations and conditions herein contained or referred to on its or their part to be kept, performed and fulfilled; and that it will pay, or cause to be

paid, the rent for water power hereinbefore reserved to be paid at the times and in the manner hereinbefore mentioned; and it is further expressly covenanted and agreed as an express condition upon which this conveyance is made and accepted, that neither the Paper Company, its successors or assigns, nor any one acting or claiming under it or them, shall at any time or in any manner construct, or maintain or operate, on or under the granted premises, any tunnel, canal or other appliance, for the production of light, heat or power, by the use of the water of the Niagara River, except from time to time by express agreement with and consent in writing of the party of the first part, based on a resolution of its Board of Directors
588 in terms authorizing such consent, and that in the event of any violation of this covenant and condition, the premises herein granted shall revert to the party of the first part, its successors or assigns.

This Conveyance Is Made and Accepted Upon the Following Further Conditions and Covenants, to wit:

Article I. The said premises shall be used by the Paper Company, its successors or assigns, for the purpose of its various manufactures (without nuisance) as hereinafter provided.

Article II. Niagara Company shall furnish and maintain for use of Paper Company during twenty-four hours of every day of the year (excepting Sundays and holidays and not more than ten other days in every year; on all of which days, however, Paper Company may use the power without further charge, if Niagara Company shall not shut the same off for purposes of maintenance or repair; rent to be waived for any other days of suspension) a full and sufficient right and opportunity (always excepting any interference from ice) to take water from the Niagara River at a point opposite the granted premises or at the option of Paper Company, from the main canal of Niagara

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Company at the point shown on the plan, and to discharge into the main tail-race or tunnel of Niagara Company through the branch tail-race constructed by Paper Company, and in conformity to the plans of Niagara Company's Engineers and to their decision 300 cubic feet of water per second when the fall available on said property shall be 120 feet and a quantity inversely proportionate to this fall of 120 feet if the said available fall be
589 more or less than 120 feet (such 300 cubic feet per second being herein held to be the equivalent of Three Thousand (3,000) horse power on the shaft); such water so discharged to be continuously carried away as aforesaid through the main tunnel of Niagara Company at its expense.

ARTICLE III. For the purpose of ascertaining the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal or canals of the Niagara Company, through the granted premises or into the tunnel of the Niagara Company by the Paper Company, its successors and assigns, the Niagara Company reserves the right, from time to time, as it may desire, by its duly authorized agent, hydraulic engineer or other employee, and with the necessary workmen or assistants, to enter upon the granted premises, to measure and compare the quantity of water drawn or suffered to flow upon or through the said premises, with the quantity granted, and may also adopt and use such other mode of making or of verifying the said measurements as the circumstances of the case may require; and the Paper Company shall at all times furnish all reasonable facilities to said employees and assistants in thus ascertaining the quantities of water drawn, or, discharged, as aforesaid.

ARTICLE IV. The Niagara Company shall construct and keep in good repair its main tunnel, and from time to time, as occasion may require, shall remove and clear out ob-

structions that may accumulate therein, always excepting ice.

The head-canals, penstocks, branch tail-race tun-
590 nels, flumes, wheel-rooms, wheel-pits and other water connections shall be made, maintained and be kept in good repair by the Paper Company, and the water in-take joined to the Niagara River or to the Niagara Company's water course shall be maintained by the Paper Company in a durable, substantial and water-tight manner. The Paper Company shall also maintain a good and substantial stop-gate at the head of each water in-take, that shall be so constructed that when requisite it may be closed, whether the water be then passing through the in-take or not, and that when closed it will shut out the water from the said in-take. The Paper Company's penstocks, flumes, wheel-rooms, and other water connections shall be so constructed and maintained that the water may be shut out from them without injury to them.

ALL the work contemplated in this article shall be done and maintained according to plans bearing the approval of and in manner satisfactory to the Engineers of the Niagara Company.

ARTICLE V. If the Paper Company shall sustain any injury to its water privilege, happening from the willful neglect or misconduct of the Niagara Company the rent reserved for water and water power, for so much of the right or privilege injured may cease during the time such injury shall continue, but no longer.

ARTICLE VI. The Paper Company shall not use more water than granted, or otherwise contracted for with Niagara Company, nor waste it, nor permit it to be wasted for want of repair, or through the deficiency of its works or otherwise; and if so wasted, or if more be used than is granted, the Niagara Company may stop the
591 water from entering the flumes by closing locking and sealing the gates across them, or by any other

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method, until such waste or excessive use be sufficiently guarded against.

Article VII. All buildings erected upon the granted premises more than ten feet in height shall be of stone or brick, the roofs covered with slate or some incombustible material, and the covings well secured against fire; and if any other be erected the Niagara Company or its assigns may enter and abate them, and have any other appropriate remedy.

Article VIII. The granted premises shall be held, used and improved for mills, manufactories or buildings appurtenant thereto, or for such dwelling houses, boarding houses, sheds and other outhouses as shall be required for the accommodation of the owners, agents, clerks, overseers, machinists, watchmen or operatives employed in such mills, and shall not be appropriated to any other purpose whatever, nor transferred, sold or alienated, except subject to all the conditions and restrictions of this conveyance.

Article IX. The Paper Company shall not use any building for any purpose, nor set up or continue any labratory, powder mill, furnace or forge, or any chemical or other works whatever, which may be so noxious or dangerous, from fire or otherwise, as to impair, injure or endanger the life, safety, health or reasonable comfort of any person living and employed in and about the land or works of the Niagara Company, or which shall endanger any buildings, property or works placed by the Niagara Company, or others, upon lands owned, granted or demised by the Niagara Company. In case any such
592 prohibited works shall be set up, continued or used, the Niagara Company may take judicial proceedings to abate them, and also may sue for damages, and may stop the water as above mentioned from passing into the flumes or canals of the Paper Company, until such prohibited works be removed or discontinued.

Neither shall the Niagara Company set up, continue or use any such prohibited works on its lands so near that of the Paper Company as to cause the above described mischiefs, or either of them; and should any such prohibited works be set up, continued or used by the Niagara Company, the Paper Company may take judicial proceedings to abate the same.

Provided, however, that the foregoing agreement to prevent nuisances is not to be understood to prevent any party from building, using and maintaining machine shops, with the smiths' forges, hammers, and other things necessary and pertaining thereto, for making all kinds of machinery, nor to prohibit any party from setting up, using, enlarging or improving any establishment for bleaching, dyeing, coloring or printing goods, with all things necessary therefor (excepting dangerous or noxious works as aforesaid), and no party shall have the right to object to the use of any building for the purposes for which it has been used before or at the time of the acquisition of his or its rights, or to object to any building previously erected, on account of the materials of which it is composed or the manner in which it may be built.

The granted premises and all works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the works of the Niagara Company, and especially any and all obstruction or pollution of the water of the Niagara River, from
593 which, near Grass Island to Niagara Company intends to draw water for domestic and other purposes.

Article X. The granted premises and the works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the Hydraulic Canal of the Niagara Falls Hydraulic Power and Manufacturing Company, as provided in an agreement between that Company and the Niagara Company, dated the 30th day of December, 1889, and recorded in the office

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of the Clerk of Niagara County on the 18th day of January, 1890, in Liber 198 of Deeds, at page 9, as amended by a modifying agreement between the same parties dated January 27th, 1896, and recorded in the said office of the Clerk of Niagara County.

ARTICLE XI. The respective successors or assigns of the parties are declared to be entitled to all the rights, advantages and forfeitures, and bound by all the obligations, duties and conditions of, and remedies against, their original parties respectively, as herein set forth, unless otherwise expressed.

ARTICLE XII. The Niagara Company reserves the right to draw off the water from the canals, or tunnels, or of closing the same temporarily, for the purpose of clearing out or removing obstructions therein, or of repairing the same, and also, whenever necessary, for the purposes of prosecuting and continuing the operations of the Niagara Company, its successors and assigns, in the building of mills and constructing the water works connected therewith, in the way usually done in similar cases, and with as little interruption in the use of water power as the circumstances and nature of the case may permit.

594 ARTICLE XIII. The power to be developed as aforesaid shall not be used elsewhere than on the granted premises, nor shall it be let or assigned on said premises to any other person at any price less than that which at the time may be charged by the Niagara Company for similar blocks of power for similar purposes; but no such transfer shall release any party claiming hereunder from any obligations of this grant, unless nor until such transfer shall have been approved and such transfer accepted by written instrument executed by the Niagara Company (with the approval of the Trustee under said mortgage), specifying the fact and extent of such release.

ARTICLE XIV. The Paper Company shall have in all roads surrounding the said premises the same rights as

any and all other takers of power from the Niagara Company, which, however, does not hereby covenant or agree to construct or provide any roads other than those now in existence. The Paper Company shall also have the right to cross the outer road or riverway, with a canal, over which it shall construct and maintain a sufficient bridge, and also have the right of dockage in front of the granted premises and along the said outer road.

Article XV. This conveyance and agreement is in all respects subject to the reservations, limitations and conditions contained in a certain mortgage or deed of trust made by The Niagara Falls Power Company to the Central Trust Company of New York, as Trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29, 1891, and was recorded in the Niagara County Clerk's Office April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office July 14th, 1891, in Liber 211 of Mortgages, at page 549.

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Article XVI. The Paper Company shall pay all the rents herein reserved for the right to take, develop and use water and water-power to the Niagara Company as herein provided, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured by the mortgage above mentioned and notice of such default shall have been received by the Paper Company; and in case of and after any such default and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereunder directly to the Trustee under said mortgage for the benefit of the bondholders.

Provided, However, and This Grant is Upon the Express Condition That (1) if it shall happen that the said

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rent, or any part thereof, shall not be paid on any day on which the same ought to be paid as aforesaid; or, (2) if it shall happen that the Paper Company, its successors or assigns, shall fail to keep or shall violate any other condition or covenant herein contained, then, and in every such event, such default or violation may be notified to the Paper Company or to its successors or assigns by the Niagara Company, or by the Trustee of the mortgage aforesaid, and if such default or violation shall continue for sixty days after such notice thereof shall have been given either by mailing the same at the post office
596 in Niagara Falls, or by posting the same in a conspicuous place upon the granted premises, then, and in every such event it shall and may be lawful to and for the Niagara Company, its successors and assigns, into the said granted premises or any part thereof in the name of the whole, to re-enter and re-possess, have and enjoy the same again as of their first and former estate and interest therein, anything herein contained to the contrary notwithstanding, and no waiver of any such right of re-entry at any time shall affect or waive any right of re-entry accruing subsequently to such waiver.

Whenever an arbitration shall become necessary under the provisions of this conveyance, the same shall be established and conducted as follows: The Niagara Company, its successors or assigns, shall nominate one fit and impartial person, and the Paper Company, its successors or assigns, shall nominate one other fit and impartial person, which nominations shall be made and signified in writing by each party to the other; and in default of such nomination by either party for the space of thirty days after request for such nomination shall have been duly communicated in writing to such party by the other party, the person who shall have been so nominated by the other party shall appoint and associate with himself one other fit and impartial person; and if the persons

so nominated or appointed shall differ in judgment as to the subject of decision by them, they shall appoint a fit and impartial person to be associated with them for such purpose, if they can agree on such person, or, if they cannot so agree, then each of them shall nominate two fit and impartial persons, and from the names of the four persons so nominated that of one of them shall be drawn by lot, who shall be associated for the pur-
597 poses aforesaid with the said two persons previously so respectively nominated or appointed; and the decision under oath of any two of the three persons who shall be so nominated or appointed shall in all cases be binding and conclusive. If, after any nomination of an arbitrator as hereinbefore provided duly made, a person so nominated shall for any reason be unable or shall decline to serve as such arbitrator, or shall be objected to by any party, the party hereto so nominating the person so becoming unable or declining to serve, or being objected to by the other party, shall at his option have the right to substitute some fit and impartial person qualified as aforesaid as arbitrator in the place and stead of the person unable or declining to serve or being objected to, provided that no person chosen by the other two arbitrators or by lot as above contemplated shall be subject to such objection.

And Inasmuch as this is and is intended to be the corporate obligation of the two parties hereto respectively, their successors and assigns, any and all individual liability of the stockholders and trustees and directors of either and each of the corporations parties hereto is hereby expressly waived, and no party or person claiming hereunder shall at any time or place allege or assert any such individual liability in respect of any obligation or default under this agreement, or any judgment thereon, and no recourse thereon shall be had against any such stockholder, trustee or director.

BLEED THROUGH-

598 IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

Executed in two uniform originals.

THE NIAGARA FALLS POWER COMPANY,
By CHARLES A. SWEET,
Vice President.

(Seal)

Attest:

JAMES S. MILNER,
Secretary.

NIAGARA FALLS PAPER COMPANY,
By JOHN L. NORTON,
President.

(Seal)

Attest:
JOHN C. MORGAN,
Secretary.

[Acknowledgments omitted from printing.]

Hearing Exhibit No. 10.

602 NIAGARA FALLS PAPER CO.

Niagara Falls, N. Y., Nov. 30, 1896.

THE NIAGARA FALLS POWER CO.,
Niagara Falls, N. Y.

Gentlemen:—

Referring to our agreement with you of March 7, 1896, and in accordance with the provisions thereof, we give you notice that we hereby call for and shall exercise our right to take sufficient water to develop 1300 H.P., in addition to the 3000 H.P. which runs with our deed and the 2900 H.P. which we have taken from October 1, 1896, under the terms of said agreement. This will make 7200 H.P. in all; the last 1300 to be taken and paid for as soon as used not later than January 1, 1897.

Yours truly,

NIAGARA FALLS PAPER CO.,

By J. C. MORGAN,
Sec'y & Gen'l Mgr.

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603 THIS AGREEMENT, made this seventh day of March, 1896, between THE NIAGARA FALLS POWER COMPANY (hereinafter called "Niagara Company"), a corporation organized and existing under the Laws of the State of New York, party of the first part, and the NIAGARA FALLS PAPER COMPANY (hereinafter called "Paper Company"), a corporation organized and existing under the Laws of the State of Illinois, party of the second part,

WITNESSETH: That whereas the Niagara Company, by a deed of even date herewith, has conveyed to the Paper Company certain premises in the City of Niagara Falls under certain terms and conditions, as by reference to said deed will more fully appear, being the same premises

BLEED THROUGH-

described in an indenture of lease thereof made by said Niagara Company to said Paper Company, dated September 1st, 1891, and recorded October 13th, 1891, in Liber 209, of Deeds, at page 364; and

Whereas by the terms of said conveyance the Niagara Company agrees to supply to the Paper Company the right to take, develop and use upon the premises therein granted water and water-power sufficient to produce Three Thousand (3,000) Horse Power of the character and under the conditions set forth in said conveyance, for which said right to take, develop and use water and water-power the Paper Company therein agrees to pay an annual rental fixed in said deed; and

Whereas the Paper Company desires to obtain from the Niagara Company the right to take, develop and use upon said premises water and water power additional to that to be developed under the terms of said conveyance, and to pay for such right by way of rental for a term of years, and not as a condition of said conveyance, the Niagara Company being willing to comply with such desire and request of the Paper Company.

604

Now, Therefore, in consideration of the premises and of the rents and agreements hereinafter reserved and contained on the part and in behalf of the Paper Company, its successors and assigns, to be paid, kept and performed, said Niagara Company has agreed, and by these presents hereby does agree upon the conditions hereinafter stated from a date not later than October 1st, 1896, and for a period of ten (10) years thereafter, with the right to the Paper Company at its option to one or more additional term or terms of ten (10) years each, extending not later than January 1st, 1936, (every such optional right of Paper Company to a further term to be dependent upon its exercise and notification of exercise of such right at some time during the ninth (9th) year of the next preceding term), to permit the Paper Company, its successors

and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of Niagara Company or from the Niagara River, (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water) sufficient to develop and to use upon said granted premises, when and as required for use upon the said premises conveyed to the Paper Company, Twenty-nine hundred (2900) Horse Power, in addition to the Three thousand (3,000) Horse Power described by the above mentioned conveyance: the term Horse Power herein used being understood to involve and consist of the right
605 to draw, throughout the twenty-four hours of each day, and during the term of the agreement, (but excluding Sundays and legal holidays, on all of which days, however, the Paper Company may use the power without further charge, if the Niagara Company shall not shut the same off for purpose of maintenance or repairs, rent to be waived for any other days of suspension), from the canal of the Niagara Company, at a point designated in the plan of the said granted premises, through the said granted premises, and to discharge into the main tail-race tunnel of the Niagara Company by way of the shaft and the branch tail-race (already constructed upon the granted premises), one tenth (1/10) of one cubic foot of water per second, when the total fall available to the Paper Company for power purposes adjacent to the granted premises is one hundred and twenty (120) feet, or a quantity per second inversely proportionate to the said available fall, when it is more or less than one hundred and twenty (120) feet, and in order to prevent disputes as to the power in the variations of the said available fall from changes of the level of the water surface in the Niagara River or in the main tail-race tunnel, or in both, it is understood and declared that the quantity of water per second shall be varied in inverse proportion to the variation of the said available fall; thus, on a fall of one hundred (100) feet,

BLEED THROUGH-

the flow of water constituting one horse power would be twelve one-hundredths (12/100) of a cubic foot per second.

It Is Understood and Expected that the Paper Company will be able to take, use and discharge water as aforesaid on or before October 1st, 1896, from which date the
606 Paper Company shall pay the rent reserved hereunder whether or not the right hereby demised shall or shall not be exercised by the Paper Company.

It Is Agreed that at any time during any term of this agreement, whether the first or any extended term thereunder, and after ten (10) days written notice to the Niagara Company the Paper Company from time to time shall have additional right to take, use and discharge more water sufficient to develop blocks of not less than Five hundred (500) Horse Power, and up to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Paper Company's wheel-pit to the main tunnel of the Niagara Company, which water and water power shall be measured in the manner above stated and during any and every term of this agreement, the Paper Company shall make payment of rental as hereinafter specified for the largest amount of water (not less than 5900 Horse Power) which it shall theretofore have called for and shall be entitled to take, use and discharge under and of its agreements with Niagara Company.

It Is Further Agreed that all such water and water power shall be used and developed upon the premises conveyed in said deed of even date herewith, and shall not be used otherwise or elsewhere than is herein provided, the right to use and develop such water and water power may be sub-let or assigned for use upon said premises for any purposes not injurious to the Niagara Company, or to the lessees of adjoining property, the Directors of the Niagara Company to be sole judge upon the question of

injury under the meaning of this contract; it being understood that the Paper Company intends to use such power for the purpose of manufacture of pulp,
607 paper and other paper products.

THE PAPER COMPANY for itself, its successors and assigns, hereby covenants that for the additional right to take, use, discharge and develop water and water power to be provided hereunder, it will, on the tenth day of the month succeeding the end of each quarter, make quarterly payments in gold of the present standard of weight and fineness, as follows:—

(1) The sum of Twenty-nine thousand ($29,000.00) Dollars per annum for the Twenty-nine hundred (2900) Horse Power, to which it is first entitled hereunder, such payment to begin the first day of October, 1896, and being additional to its obligation to pay the sum of Twenty-four thousand ($24,000.00) Dollars per annum for the right to take, use, discharge and develop Three thousand (3,000) other Horse Power under said deed.

(2) For any additional right to take, use, discharge and develop water and water-power next called for, for use hereunder, in blocks of not less than Five hundred (500) Horse Power up to the full capacity of the discharge tunnel on the Paper Company's lands, payment by the Paper Company shall be at the rate of Ten ($10) Dollars per Horse Power per annum, for and during every year after such right to take, use, discharge and develop water and water-power shall have been called for, whether such right shall or shall not actually be exercised by the Paper Company; it being understood and intended that the aggregate annual amount payable by the Paper Company, its successors and assigns, during the term of this agreement or any extended term for the right to take, use, discharge and develop water and water power shall never be less than the rental for the total amount of water and water-power up to that time called for at the rate

BLEED THROUGH-

608 here specified, whether such amount of power shall or shall not be actually used by the Paper Company, its successors or assigns.

It Is Agreed that the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal of the Niagara River, through the premises or into the tunnel of the Paper Company by the Niagara Company, its successors and assigns, shall be ascertained, measured and paid for as is provided in like regard in the conveyance of even date herewith from the Niagara Company to the Paper Company, and hereinbefore referred to; and that all the conditions in respect of the delivery and use of the water to produce Three thousand (3,000) Horse Power provided to be paid for under the terms of said conveyance shall apply to and govern the use of the additional Horse Power provided to be taken under this agreement, excepting that no failure by the Paper Company, its successors and assigns, to pay the rents herein reserved for the right to take, use, discharge and develop water and water power under this agreement shall constitute such a violation of the covenant of said conveyance in that regard as shall entitle the Niagara Company, its successors or assigns to enter and re-possess itself or themselves of the premises granted by said conveyance, so long as the conditions thereof shall be faithfully observed by the Paper Company, its successors and assigns.

This Agreement is in all respects subject to the reservations, limitations and conditions, terms and provisions contained in a certain mortgage or deed of trust made by The Niagara Falls Power Company to the Central Trust Company of New York, as Trustee, as security for bonds
609 to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29th, 1891, and was recorded in the Niagara County Clerk's Office April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage

dated June 29th, 1891, and recorded in Niagara County Clerk's Office July 14th, 1891, in Liber 211 of Mortgages, at page 529.

THE PAPER COMPANY shall pay all the rents herein reserved to Niagara Company as herein provided during the original term or any extension thereof, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured by the mortgage above mentioned and notice of such default shall have been received by the Paper Company; and in case of, and after any such default, and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereunder directly to the Trustee under the said mortgage for the benefit of the bondholders.

IN WITNESS WHEREOF the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, on the day and year first above written.

BLEED THROUGH-

Executed in two uniform originals.

THE NIAGARA FALLS POWER COMPANY,
By CHARLES A. SWEET,
Vice President.

(Seal)

Attest:

JAMES S. MILNER,
Secretary.

NIAGARA FALLS PAPER COMPANY,
By JOHN L. NORTON,
President.

(Seal)

Attest:

JOHN C. MORGAN,
Secretary.

[Acknowledgment and County Clerk's certificate omitted from printing.]

Hearing Exhibit No. 11.

612 NIAGARA FALLS PAPER COMPANY

to

INTERNATIONAL PAPER COMPANY

DEED

THIS INDENTURE made this 31st day of January in the year 1898 between the Niagara Falls Paper Company, a corporation organized and existing under the laws of the State of Illinois and authorized to do business in the State of New York hereinafter called the "Grantor" party of the first part and International Paper Company, a corporation duly organized and existing under the laws of the State of New York, hereinafter called the "Grantee" party of the second part

WITNESSETH: Whereas, the grantor has acquired certain lands, water and water power at Niagara Falls in the State of New York by a certain indenture from the Niagara Falls Power Company dated March 7 1896 and recorded April 9 1896 in the office of the County Clerk of Niagara County in said State in liber 242 page 232 and

WHEREAS the Grantor has agreed to sell, convey and assign the said lands and the said water and water power and to assign the lease thereof to the grantee,

Now, therefore the said Niagara Falls Paper Company, in consideration of the sum of one dollar and other good and valuable consideration to it in hand paid by the Grantee, the receipt whereof is hereby acknowledged, has bargained and sold and does hereby grant and convey unto the Grantee, its successors and assigns forever,

ALL that certain lot, piece or parcel of land and land under water in the City of Niagara Falls, County of Niagara and State of New York, being part of lot 11 Steadman Farm (so called) more particularly described as follows: Beginning at a point in the southerly line of Buffalo

BLEED THROUGH-

Street where said line is intersected by the west line of lot 11 Steadman Farm (so called), running thence south eighty-eight (88) degrees and forty (40) minutes east magnetic, along said southerly line of Buffalo Street seven hundred and ninety three and three-tenths (793.3) feet to a stone monument set in said southerly line; thence south four (4) degrees and sixteen (16) minutes west magnetic six hundred and eighty seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River;
613 thence by curve to the southwest with radius of one hundred (100) feet one hundred and ninety-five and five tenths (195.5) feet; thence north sixty three (63) degrees and forty-three (43) minutes west magnetic seven hundred and two and three tenths (702.3) feet; and thence north three (3) degrees and fifty (50) east magnetic four hundred and seventy six (476) feet to the point or place of beginning: containing eleven and seventy-five one hundredths (11.75) acres of land and land and under water more or less;

Together with three thousand horse power, such as are described in said Indenture, to be used as prescribed in the conditions and covenants therein set forth, with all the privileges and appurtenances to the same belonging; a plan of said premises showing the point of water in take, wheel-pit, discharge tunnel and other appurtenances, being annexed to said Indenture

Together with the tenements, hereditaments and appurtenances, and all the estate, right, title and interest of the Grantor in and to said premises and every part thereof and also all leaseholds, leases, rights under leases or under contracts, covenants and agreements, terms or parts of terms owned by the Grantor, or to which it now is or shall at any time hereafter become entitled: All machinery, tools, implements, materials, furniture and rights and privileges of every kind and description however derived

and wherever situated; all lands whether under water or not; all water powers and leases thereof and all interests therein; all improvements upon rivers, canals, ponds and lakes, owned by the Grantor and all rights to float logs thereon and any and all other rights, privileges and interests therein; all rights of flowage, shorage, boomage and all rivers, lakes, canals, shores, sluice and other rights; all mill rights and privileges, water-ways and other ways and all real estate and interest therein wherever such real estate may be situated and all mixed and personal property of whatever nature or description appurtenant to or connected with or in use upon the property hereby conveyed now owned by the Grantor or in which it has any interest; all papers, maps, inventories and documents in any wise referring or relating to the property hereby conveyed, so far as the same are muniments of title,
614 excepting however, from the property hereby granted and assigned all cash on hand, book accounts, amounts due to Grantor, manufactured paper on hand and stocks, bonds and other securities held by it on in which it has any interest

Excepting and Reserving therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo Street and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls Power Company by deed dated June 11 1892 and recorded in the Niagara County Clerk's Office June 29 1892 in liber 265 at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's Office June 11 1892

And also excepting and reserving therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Grantor to connect with the main tunnel of the Ni-

BLEED THROUGH-

agara Falls Power Company, in which branch tunnel, however, the grantee, its successors and assigns, shall have the sole right of exclusive use for its and their own purposes so long as it and they shall continue to pay the rental hereinafter specified for the right to take, use and develop water and water power to the extent of three thousand (3000) horse power and all other conduits, sluice-ways, wheel-pits and tunnels of the Niagara Falls Power Company.

BEING the same premises conveyed and demised to the Grantor by the Niagara Falls Power Company by the Indenture hereinbefore mentioned, subject, however, to all the covenants, conditions and reservations therein-contained and reference is hereby made to said Indenture for a particular statement thereof.

TO HAVE AND TO HOLD the above granted premises to the said party of the second part, its successors and assigns forever, but nevertheless subject to the reservations and to the agreements, terms and conditions and all other matters and things in said Indenture set forth as obligatory upon the party of the second part thereto and among other things, to the payment to the Niagara Falls Power Company, its successors and assigns, of the annual rental provided for by said Indenture which may accrue or become due from and after the date of the transfer of the
615 property hereby conveyed.

THE GRANTOR, for itself, its successors and assigns covenants with the Grantee, its successors and assigns, that the Grantor is lawfully seized in fee of the above granted land, that it has good right to convey the same as aforesaid; that the same excepting as in said Indenture mentioned are free of all incumbrances; that the Grantor will execute or procure any further necessary assurance of the title to said premises and that it will warrant and defend the same and the estate therein as hereby conveyed against the lawful claims and demands of all persons and

that said power by the said Indenture agreed to be taken and paid for shall be maintained as therein provided and that the grantee on paying the yearly rental for such power and performing the covenants and conditions therein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever

And for the consideration aforesaid and also in consideration of the assumption by the grantee of the obligation to pay the rent by said Indenture reserved which may accrue from and after the date of the transfer to the grantee of the property hereby conveyed and of the obligation to fulfill the covenants of said lease from and after said date, the grantor does hereby further grant, convey, assign, transfer and set over unto the grantee the said Indenture hereinbefore mentioned, together with all and singular the premises, property, easements, rights and privileges therein mentioned and described and all buildings and improvements thereon with the appurtenance and all right title and interest of the grantor therein or thereto and in and to any and all property, easements, rights and privileges granted and conveyed by said Indenture.

To Have and to Hold all the said lands, water and water power and said Indenture, unto the said grantee, its successors and assigns forever, subject, however as to the said water and water power conveyed thereby to the conditions and terms and to the covenants, agreements and limitations in said indenture contained and the grantor does hereby covenant, promise and agree to and with the said grantee that the said assigned premises and the rights, therein hereby conveyed and assigned, now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances, whatsoever, except as hereinbefore mentioned

616

BLEED THROUGH-

IN WITNESS WHEREOF, the Niagara Falls Paper Company in pursuance of resolutions duly adopted by its Board of Directors and also by its stockholders, has caused this indenture to be executed by its President in its name and its corporate seal to be hereto affixed and attested by its Secretary, this 31st day of January 1898

NIAGARA FALLS PAPER CO.,
By J. L. NORTON, *Pres.*

(Corporate Seal)

Attest

J. C. MORGAN, *Sec'y.*

[Acknowledgment and County Clerk's certificate omitted from printing.]

Recorded, February 7 1898 at 12;20 P.M.

SAMUEL H. PETTIT,
Clerk.

The above deed is recorded in liber 250 of Deeds page 598

Hearing Exhibit No. 12.

618 THIS AGREEMENT made this first day of June, 1898, between NIAGARA FALLS POWER COMPANY, hereinafter called "Niagara Company", a corporation organized and existing under the laws of the State of New York, party of the first part, and INTERNATIONAL PAPER COMPANY, hereinafter called "Paper Company", a corporation organized and existing under the laws of the State of New York, party of the second part,

WITNESSETH, that

WHEREAS, the Niagara Company, by a deed dated March 7, 1896, conveyed to the Niagara Falls Paper Company certain premises in the City of Niagara Falls, together with the perpetual right to take, develop and use upon the premises therein granted, water and water power sufficient to produce three thousand horse-power, of the character and under the terms and conditions in said deed particularly mentioned, to which reference is hereby made;

WHEREAS, by an agreement dated the same day the Niagara Company also agreed to permit the said Niagara Falls Paper Company, its successors and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of the Niagara Company, or from the Niagara River, sufficient to develop and to use upon premises conveyed to the Paper Company twenty-nine hundred horse-power in addition to the three thousand horse-power hereinbefore mentioned, of the character and upon the terms and conditions in said agreement particularly mentioned, to which reference is hereby made, and also the further right, upon ten days' written notice to the Niagara Company, to take, use and discharge
619 more water, sufficient to develop blocks of five hundred horse-power on to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Niagara Falls Paper Company's wheel-pit to the main tunnel of the Niagara Company, upon the terms in said agreement particularly mentioned; and

WHEREAS, the said agreement for such additional twenty-nine hundred horse-power, and such further amounts in blocks of five hundred horse-power as the Niagara Falls Paper Company should elect to take, provided for the use of such additional power for a period of ten years from October 1, 1896, with the right to the Niagara Falls Paper Company and its assigns, at their option, to one or more additional term or terms of ten years each, extending not

BLEED THROUGH-

later than January 1, 1936, upon the same terms, such option to be exercised and notification of such exercise given the Niagara Company at some time during the ninth year of the next preceding term; and

WHEREAS, the said extensions were limited by said agreement to January 1, 1936, for the reason that the present term of existence of the Niagara Company expires March 31st, 1936, and the Niagara Company is willing to continue the said extensions beyond the date so long as it shall continue in existence; and

WHEREAS, the Niagara Falls Paper Company subsequently gave notice to the Niagara Company of its election to take thirteen hundred additional horse-power under the said option in addition to the twenty-nine hundred provided for by said agreement; and

WHEREAS, the Paper Company has purchased the real estate, property and rights of the Niagara Falls Paper Company, including the real estate conveyed to it by the said deed from the Niagara Company, and all its rights thereunder and under the said agreement hereinbefore mentioned, and took and received a conveyance and
620 assignment thereof from the Niagara Falls Paper Company dated January 31st, 1898; and

WHEREAS, the said purchase, conveyance and assignment were made and received by the Paper Company upon the agreement on the part of the Niagara Company to consent to the said conveyance and assignment by the Niagara Falls Paper Company, and to confirm to the Paper Company the grants and rights included in the said deed and agreement hereinbefore mentioned and so assigned to the Paper Company;

NOW, THEREFORE, in consideration of the premises and of the assumption by the Paper Company of the obligations in said deed and agreement, and of the agreement on the part of the Paper Company to pay the rent and fulfill the terms and conditions therein reserved and contained,

and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto do hereby covenant and agree to and with each other as follows, that is to say:

First. The Niagara Company hereby consents to the transfer and assignment to the Paper Company of the said deed and agreement, both dated March 7, 1896, between the Niagara Company and the Niagara Falls Paper Company, and of all right, title and interest of the Niagara Falls Paper Company therein, thereto and thereunder, and does hereby confirm the grants, rights and agreements so transferred and assigned to the Paper Company, and agrees with the Paper Company to faithfully fulfill and carry out the said agreement with the same force and effect as if said deed and agreement originally had
621 been made with the Paper Company instead of with the Niagara Falls Paper Company.

Second. The Niagara Company hereby further covenants and agrees that the Paper Company shall have the right at its option after January 1, 1936, to one or more additional term or terms of ten years each, so long as the corporate existence of the Niagara Company shall be renewed and continued, to take and discharge through the Niagara Company's main tunnel from the main canal of the Niagara Company or from the Niagara River (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water), sufficient to develop and to use upon the said premises the said forty-two hundred horse-power, in addition to the three thousand horse-power described in the above mentioned conveyance, and upon ten days' written notice to the Niagara Company such further amounts of water as shall be sufficient to develop blocks of not less than five hundred horse-power up to the full amount of the capacity of the present discharge tunnel, leading from the bottom of the Paper Company's wheelpit to the main tunnel of the Niagara Company, such addi-

BLEED THROUGH-

tional water to be taken under said options, at the rents and upon the terms and conditions particularly mentioned in the said agreement of March 7, 1896; provided, however, that such optional right of the Paper Company to further terms beyond January 1, 1936, shall be exercised, and notification of exercise of such right given to the Niagara Company at some time during the ninth year of the next preceding term.

622 THIRD. The Paper Company hereby assumes the obligations contained in the said deed and in said agreement dated March 7, 1896, and covenants and agrees with the Niagara Company to faithfully fulfill and carry out the same.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by one of its Vice-Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its First Vice-President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

THE NIAGARA FALLS POWER COMPANY,
By CHARLES A. SWEET,
Vice-Pt.

(Seal)

Attest:

L. A. GROAT,
Secretary.

INTERNATIONAL PAPER CO.,
HUGH J. CHISHOLM,
1st Vice President.

(Seal)

Attest:

WARNER MILLER,
Secretary.

Hearing Exhibit No. 13.

625 MEMORANDUM OF AGREEMENT

THE NIAGARA FALLS POWER COMPANY

—with—

INTERNATIONAL PAPER COMPANY

Dated, March 1, 1919.

626 MEMORANDUM OF AGREEMENT, made and executed in duplicate this 1st day of March, 1919, by and between THE NIAGARA FALLS POWER COMPANY, a corporation of New York, having its principal place of business at Niagara Falls, New York, (hereinafter called "LESSOR") party of the first part, and INTERNATIONAL PAPER COMPANY, a corporation of New York, having its principal place of business at Corinth, New York, and owning a plant at the City of Niagara Falls, New York, (hereinafter called "LESSEE") party of the second part.

WHEREAS, LESSOR was organized through the consolidation, effective October 31, 1918, of certain corporations, among which was another corporation of the same name, which latter corporation is sometimes hereinafter called "constituent corporation" or "constituent company"; and

WHEREAS, LESSOR is the owner of certain valuable lands and corporeal hereditaments appurtenant thereto, located within the City of Niagara Falls, and other rights, whereby it is able to develop hydraulic power continuously through the use of the waters of the Niagara River, and it and its predecessors have heretofore constructed works for that purpose, and have also constructed works and machinery at one or more places in said City, hereinafter called "generating station", for the purpose of transforming said hydraulic power into electric energy; and

627 WHEREAS, LESSEE is a private corporation organized under the Business Corporations Law of the

BLEED THROUGH-

State of New York, and is the successor in interest of a corporation formerly existing under the laws of the State of Illinois, called "Niagara Falls Paper Company"; and

WHEREAS, under date of March 7, 1896, said constituent corporation did execute and deliver to said Niagara Falls Paper Company a deed, (recorded in Niagara County Clerk's Office April 9, 1896, in Liber 242 of Deeds at page 232) granting to it, its successors and assigns certain lands within said City, together with the right to take, develop and use on said premises water and water power sufficient to produce three thousand (3,000) horse power on the shaft, computed and measured as stated in said deed of conveyance, for which right said Niagara Falls Paper Company agreed to pay the sum of Twenty-four Thousand Dollars ($24,000) per annum in equal quarterly installments of Six Thousand Dollars ($6,000) each on the last day of every March, June, September and December in each year; and

WHEREAS, said constituent company did on said 7th day of March, 1896, make its further written agreement to permit said Niagara Falls Paper Company, its successors and assigns, to take from the Niagara River, and to discharge through the constituent company's main tunnel, waters sufficient to develop and to use upon the premises conveyed in the above recited deed, when and as
628 required for use by said Niagara Falls Paper Company, its successors and assigns, twenty-nine hundred (2900) horse power in addition to the three thousand (3,000) horse power described by the above mentioned conveyance, measured as therein defined, together with the further right to take, use and discharge more water, sufficient to develop blocks of not less than five hundred (500) horse power, up to the full amount of the capacity of the discharge tunnel then leading from the bottom of a wheelpit of said Niagara Falls Paper Company to the main tunnel of constituent company, all of which power, in

excess of three thousand (3,000) horse power, was to be paid for at the rate of Ten Dollars ($10) per horse power per annum during every year, as more particularly specified in said lease of March 7, 1896, which lease was to continue for a period of ten years after October 1, 1896, with the right or option, to be exercised as therein provided, for one or more additional terms of ten years each, extending not later than January 1st, 1936; and

WHEREAS, said Niagara Falls Paper Company did subsequently give notice to constituent company of its election to take thirteen hundred (1300) additional horse power under said option, in addition to the twenty-nine hundred (2900) horse power provided for by said agreement, whereby said Niagara Falls Paper Company became obligated to take a total of seventy-two hundred (7200) horse power; and

629 WHEREAS, thereafter and on or about the 31st day of January, 1898, said Niagara Falls Paper Company transferred the said real estate so conveyed to it by constituent company, and also said lease, each dated March 7, 1896, to LESSEE, to which transfer and assignment said constitutent company did thereafter by agreement dated June 1, 1898, duly consent as well as agree that LESSEE might still further renew said lease beyond January 1, 1936, during the corporate existence of constituent company, and said LESSEE hereunder did duly assume the obligations of said Niagara Falls Paper Company contained in said deed and in said agreement each dated March 7, 1896; and

WHEREAS, said LESSEE did thereafter increase its taking of water under said lease so that it has developed an aggregate of eighty-one hundred fifty-six and two tenths (8156.2) horse power under said deed and lease, for which it has paid at the aggregate rate of Seventy-five Thousand Five Hundred Sixty-two Dollars ($75,562) per annum, to-

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wit: Twenty-four Thousand Dollars ($24,000) per annum for three thousand (3,000) horse power under said deed and Fifty-one Thousand Five Hundred Sixty-two Dollars ($51,562) per annum for fifty-one hundred fifty-six and two tenths (5156.2) horse power under said lease; and

WHEREAS, the parties hereto desire to enter into an agreement for the conditional surrender to LESSOR of the rights in respect to such use of water by the LESSEE,
630 and for the grant by LESSOR to LESSEE in exchange therefor, upon the basis hereinafter provided, of a *pro tanto* lease of or easement in gross in the lands, water rights, works and machinery of LESSOR, in the City of Niagara Falls, New York, so far as the same are devoted by LESSOR to the development of hydraulic power and its transformation into electric energy, to the extent necessary for supplying electric energy to LESSEE as hereinafter specified, and for transmitting said electric energy through the system of transmission lines and substations of LESSOR to the plant and premises of LESSEE, in the City of Niagara Falls, New York; and

WHEREAS, LESSOR is willing

(a) to grant such *pro tanto* lease or easement in gross to the extent of using reasonable diligence to supply at the generating station of LESSOR electric energy for the uses of LESSEE at a fixed maximum rate of delivery, being the "firm power" as hereinafter defined and specified; and

(b) to use reasonable diligence to transmit such electric energy to the plant of LESSEE hereinafter described, upon the full and faithful performance and observance by LESSEE of the promises, covenants and agreements hereinafter set forth, to be performed on the part of LESSEE;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:
631 That for and in consideration of the premises, and

the mutual promises and agreements hereinafter expressed, and the sum of One Dollar ($1) by each party to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto do agree with and promise to each other as follows:

ARTICLE I: LESSOR hereby grants to LESSEE such right by way of lease and easement in gross in and to the lands, water rights, works and machinery of LESSOR, so far as the same are devoted to the development of hydraulic power and its transformation into electric energy, as may be necessary for supplying to LESSEE, its successors and assigns, at the generating station of LESSOR, "firm power" as hereinafter specified, so long as LESSOR shall continue to divert, or shall be entitled to divert, water from the Niagara River for use in the development of power, but such grant (1) is hereby limited to the purposes of this contract, and the performance thereof in the manner hereinafter specified; (2) is subject to all the limitations and qualifications hereinafter contained, and (3) is expressly subject to the limitation that no right is conferred on LESSEE by any provision of this agreement to interfere in any manner with the use, management or operation of said lands, water rights, works and machinery of LESSOR, nor to enter into possession of the same or any part thereof, excepting the possession of electric energy that is to be supplied and transmitted to LESSEE by LESSOR in the manner and to the extent hereinafter specifically provided.

632 ARTICLE II: Electric energy that is to be supplied and transmitted hereunder shall be designated as (a) "firm power" and (b) "variable power", which are respectively defined as follows:—

"Firm power" means electric energy available to be taken from the supply circuits of LESSOR at any rate up to but not in excess of the hereinafter specified rate of delivery, which LESSOR stands ready and agrees to use reason-

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able diligence to furnish at its generating station, and like diligence to transmit to the premises of LESSEE, for which readiness and undertaking so to supply and transmit, LESSEE promises to pay in any event during the full term of this agreement for the maximum rate of delivery at the price hereinafter specified, whether such electric energy be actually taken or used by LESSEE or not, and with no right on the part of LESSEE to any credit, offset or reduction, except as hereinafter provided, by reason of any omission on its part to take and use the same, or by reason of any alleged other disposition or use of such "firm power" or any part thereof by LESSOR during the omission of such taking by LESSEE.

"Variable power" means electric energy supplied and transmitted to the aforesaid point of delivery at any rate exceeding the rate herein specified for "firm power", but no obligation in respect of "variable power" is imposed upon LESSOR hereunder.

The rate of delivery at which "firm power" can
633 be continuously taken under this agreement is hereby fixed at eight thousand seven hundred and fifty (8750) EHP, and the obligation of LESSEE to pay rental for the supply and compensation for the transmission thereof, except as hereinafter provided, shall continue during the life of this agreement.

ARTICLE III: The electric energy herein specified shall be supplied at the generating station of LESSOR in the form of three-phase, twenty-five cycle alternating current, at approximately twelve thousand volts, and LESSOR covenants and agrees that it will construct and maintain a transmission line or lines sufficient for the transmission of said "firm power" to the premises of LESSEE on Buffalo Avenue in the City of Niagara Falls, New York, described in said deed of March 7, 1896, and a supplemental lease of land from constituent company to LESSEE, dated January 1, 1912,

and further agrees that from the date of completion of such transmission line or lines, and so long thereafter as LESSEE shall perform all its covenants and agreements hereunder LESSOR will use reasonable diligence continuously so to supply and transmit, for twenty-four (24) hours in each day during the term hereof, electric energy at any rate of delivery demanded by LESSEE not in excess of the said rate at which "firm power" is furnishable hereunder, for the use of LESSEE.

Such supplying of electric energy at the generating station of LESSOR for the use of LESSEE shall be deemed
634 a *pro tanto* lease or grant of easement in gross in the lands, water rights, works and machinery of LESSOR devoted to the development and generation of said electric energy to the extent measured by the "firm power" to be furnished as herein specified, subject always to the limitations and qualifications set forth in this agreement.

ARTICLE IV: (a) LESSEE hereby grants to LESSOR such right of ingress and egress to and from its said premises from and to adjacent streets, and such right to construct, maintain and replace upon the premises of LESSEE, the requisite poles, wires, conduits and transmission lines necessary for the purposes of this agreement, so located as to be free at all times from danger of interference from or with any structures, works or conduct of LESSEE, or of injury therefrom or thereto, and LESSEE shall also permit LESSOR and its duly authorized agents, servants and employees, the right to enter upon said premises and plant of LESSEE at any reasonable time for the purpose of installing, repairing and inspecting any electric or other devices and machinery thereon or for any purpose connected with the receipt and use of any electric energy by LESSEE.

(b) The said electric energy to be supplied and transmitted to LESSEE shall be used upon the said premises occupied by LESSEE hereinbefore specified, and upon premises

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owned or occupied by LESSEE, its successors or assigns, directly adjoining said specified premises of LESSEE, and shall not be leased, used or transmitted for use
635 elsewhere, except with the written consent of LESSOR. LESSEE promises and agrees that no electric or other energy supplied or transmitted to it by LESSOR shall be used for any purpose for which, by virtue of any contract heretofore made by any predecessor of LESSOR, or by virtue of any statute, LESSOR is obligated to refrain or omit from selling, leasing or delivering electric or other energy.

(c) LESSEE shall furnish, keep and maintain in good order and repair all apparatus and devices furnished by it in respect of the service to be rendered, and all such apparatus and devices shall be as nearly as possible of standard design and construction in general commercial use, and adapted for the purpose to which it is to be applied by LESSEE, and shall be operated and maintained to secure the best results in the use of said electric energy and the electric equipment of both parties.

(d) LESSEE shall maintain as high a power factor as possible by the adopting of reasonable operating conditions and corrective devices, and agrees that the power factor maintained by it shall never be less than ninety per centum (90%), and LESSEE shall also maintain as near a true balance of phases as is reasonably possible in the use of electric energy taken, and agrees that no variations between phases will be allowed by it which are more than ten per centum (10%) of the "firm power".

636 (e) In the event that said electric and/or other devices and apparatus used by LESSEE shall not be of a kind and/or shall not be maintained in a condition of repair satisfactory to LESSOR, LESSEE agrees, upon receipt of written notice to such effect from LESSOR, forthwith to install devices and apparatus of such kind and character as shall be reasonably unobjectionable to LESSOR, and

promptly to repair or place in a high state of efficiency any and all such electric and/or other devices and apparatus.

(f) Upon the termination of this agreement for any cause or reason whatsoever, LESSOR, its duly authorized agents, servants and employees shall have the right to enter upon the premises of LESSEE, and remove therefrom all of the meters, electric apparatus, machinery, devices and property of every kind and character whatsoever, belonging to LESSOR, in the possession of LESSEE, or located upon or attached to its premises or property.

(g) LESSEE shall not install or utilize any devices whatsoever by reason of which the continuity of the electric energy to be supplied and taken shall be interrupted for the purpose, or so as to accomplish the result, of interfering with or reducing, or purporting to reduce, temporarily or otherwise, the readings of any meters provided for the measurement of such electric energy, or which may reduce the readings of such meter from the normal read-
637 ings under the ordinary and usual methods of using electric energy.

In case of any controversy respecting any matter or thing specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of this ARTICLE IV, such controversy shall be referred to the arbitrators or arbitrator mentioned in ARTICLE V hereof, and the written determination of such arbitrators or arbitrator served upon each party shall be binding and conclusive as to the interpretation thereof, and as to whether any particular matter or thing is or is not within the meaning and scope of the language hereof.

ARTICLE V: For the purpose of measuring and ascertaining the amount of electric energy that may be supplied and transmitted, it is agreed that seven hundred forty-six (746) watts shall be deemed the equivalent of one (1) electric horse power, and the measurement of the said EHP shall be determined as follows:—

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A graphic recording wattmeter, of the most improved make, satisfactory to both parties hereto, shall be furnished by LESSOR and attached to the lines of LESSOR at such place or places as to measure the electric energy before it enters any of the apparatus of LESSEE. Such metering apparatus shall be installed on the premises of LESSEE on the high tension side of the transformers to be located on the premises of LESSEE, calibrated, sealed and maintained by LESSOR, but LESSEE shall have the privilege of installing its own meters as a
638 check to the apparatus of LESSOR. The highest five minute peak reading for each day in which such reading exceeds the amount of "firm power" so agreed to be paid for hereunder shall be noted, and the excess thereof for such days in each calendar month above said "firm power" so agreed to be taken and paid for, shall be added together, and the total thereof shall be divided by the number of days in said calendar month, and the quotient upon such division shall be considered as the amount of "variable power" for which LESSEE shall be charged for such calendar month.

In the computation of the amount of "variable power", no note shall be had or taken of any deficiency in the use or supply of "firm power", and for each day in each calendar month when the highest five minute peak reading of the wattmeter shall not exceed the "firm power" so agreed to be taken, it shall be conclusively presumed, for the purpose of determining the amount of "variable power" to be paid for, that there is no deficiency in the supply of "firm power" for such day, provision being otherwise made herein for a diminution in payment in case of any diminution, discontinuance or deficiency in "firm power" supplied hereunder.

Either party hereto, upon proper notice to the
639 other party, may at any time have said meter tested and set by a competent and disinterested person, satisfactory to both parties, all expense and cost of such testing or setting to be borne by the party calling for the same.

In case of any dispute between the parties hereto, regarding the calibration and operation of the above measuring apparatus, the controversy shall be referred to the proper State authorities having jurisdiction over electric meters, and in case of non-existence of such State authorities, or their failure to act, the controversy shall be referred to the electrical testing department of Cornell University, and the decision of such State authorities, or of the person at that time in charge of the electrical testing department of Cornell University, as the case may be, shall be final and binding upon both parties.

ARTICLE VI: It is expressly understood that the electric energy hereinbefore specified is to be developed by LESSOR through the use of waters taken from the Niagara River, and that said river is subject to fluctuations in the height of the waters therein, arising from the winds, ice, from low water level in the Great Lakes and from other sources beyond the control of LESSOR; and it is also understood that the Niagara River, where the lands of LESSOR border upon,
or are covered by, the waters thereof, is claimed
640 to be a navigable stream, and that by reason of such claimed navigability, and the fact that said river constitutes an international boundary, and on other grounds, said Niagara River is claimed to be subject to governmental control; and it is also understood that ice and other floating materials sometimes obstruct the flow of water to and in the canals, flumes and wheels of LESSOR. It is specifically agreed that all the promises and covenants herein contained of LESSOR are made subject to such

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diminutions and interruptions in the flow of water, the possibility of governmental supervision and control, and to such consequent interruptions and discontinuances in the supply of electric energy hereunder as may result from the foregoing causes or any other causes beyond the reasonable control of LESSOR, and that LESSOR shall in no event be liable for any damages or claims (other than a pro rata abatement of the net rental payable for such supply and compensation payable for transmission, after the credits specified in ARTICLE IX hereof shall have been made) because of any interruptions in the continuance of supply arising from any of the foregoing causes or reasons, or from any accident, or any necessity for the making of repairs or improvements, or the removal of any of its works or machinery. In case LESSOR shall be prevented from delivering said electric energy by reason of strike, or in case LESSOR shall be prevented from delivering or LESSEE shall be prevented from taking said electric energy by reason of riot, fire, invasion, explosion, act of God or the public enemies, or judicial or administrative order, then
641 LESSOR shall not be obligated to deliver, nor LESSEE to take, use or pay for such electric energy during the period of such prevention, but LESSOR and LESSEE shall be prompt and diligent on their part respectively in removing and overcoming any such cause or causes and remedying and rectifying such conditions, and as soon as such cause or causes of interruption are removed, shall resume and continue the furnishing and transmission or the taking and use (as the case may be) of electric energy under the terms hereof. It is also agreed that LESSOR shall not be in any manner bound to obtain energy from any other source than the use of the waters of the Niagara River in the carrying out of this contract, or to provide any additional machinery or modify its works for that purpose, and that for any total or partial interruption or discontinuance in the supply or transmission of electric energy, the sole claim and recourse of LESSEE, or liability

of LESSOR, shall be either (1) a diminution and adjustment (proportionate to the length and extent of such interruption or discontinuance) of the net cash payment for rental, and compensation for transmission, under ARTICLE IX hereof, and/or (2) the action in equity or notice and termination as provided in ARTICLE XI hereof, and that no damages for loss of profits, or based upon cost of substituted energy, or of any character other than proportionate diminution of the said net payment for rental, and compensation for transmission, shall be allowable against LESSOR under any circumstances.

642 ARTICLE VII: LESSEE shall discontinue the use of any or all "variable power" hereunder whenever required so to do upon notice from LESSOR. LESSOR also reserves the right to discontinue at any time the entire supply of electric energy hereunder, in case of the failure of LESSEE to conform to any of the provisions of ARTICLE IV of this agreement for ten days after written notice of the award of any arbitrators or arbitrator hereunder, or if LESSEE's method of operating any of its devices or apparatus is in any way abnormal to such an extent as to cause objectionable disturbances or displacements on the distributing system of LESSOR, but LESSOR will resume such supply when and if LESSEE shall have corrected such breach, default or failure, and/or shall have remedied its objectionable methods.

ARTICLE VIII: Upon condition that, and so long as LESSOR shall duly furnish or stand ready to furnish to LESSEE the "firm power" specified in ARTICLE II hereof, LESSEE hereby grants and releases to LESSOR every and all right which LESSEE now has under the aforesaid deed of constituent company to Niagara Falls Paper Company of March 7, 1896, and/or under the lease of said constituent company to Niagara Falls Paper Company under date of March 7, 1896, and/or under any other grant or agreement of constituent company or of LESSOR, to draw from the Ni-

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agara River and/or the main canal of constituent com
pany, any water for use in the development of power, and
LESSOR may take and use any water or flowing waters
which LESSEE has heretofore had or claimed the right so
to use in the development of power and use the
643 same through any of LESSOR's own penstocks, flumes,
canals, water-wheels and tail-races for the purpose of
developing hydraulic power from which to generate elec-
tric energy to be delivered to LESSEE in exchange there-
for as required by this contract, and/or for any other pur-
poses of said LESSOR. LESSOR shall have the right to close
any gate or gates or to build any structure or structures,
or to remove any existing structures, the closing, construc-
tion or removal of which, in the judgment of LESSOR, may
be necessary to enable it to receive the full benefit and use
of the water rights so surrendered to it by LESSEE, so long
as LESSOR shall furnish or stand ready to furnish the "firm
power" specified in ARTICLE II hereof in place of said water
rights. In case at any time, by reason of foreclosure of
existing mortgages or insolvency, or governmental inter-
ference, or any other cause whatever, it shall become im-
possible for LESSOR, or LESSOR shall fail continuously for
a period of ninety (90) days to carry out this agreement
and to deliver the "firm power" specified in ARTICLE II
hereof, then, at the option of LESSEE, evidenced by written
notice given forthwith, all original rights of LESSEE in, to
and under the aforesaid deed of March 7, 1896, and the
aforesaid lease of March 7, 1896, and said agreement of
June first, 1898, shall revive and continue in full force and
effect to the same extent as if this conditional grant and
release thereof had not been made.

ARTICLE IX: LESSEE agrees to pay as rent reserved
644 for the lease and/or grant herein made, and the
electric energy to be supplied hereunder at the gen-
erating station of LESSOR, and as compensation for the
transmission of the same to the said plant of LESSEE, at

the rate of Twenty Dollars ($20) per EHP per annum, or at such other lawful rate as may be hereafter fixed for said eighty-seven hundred and fifty (8750) EHP "firm power" and at the same rate for any "variable power" used by LESSEE, measured and determined as provided in ARTICLE V hereof; provided, however, that LESSEE shall credit upon the foregoing amount as compensation to LESSEE for the water rights granted, released and surrendered by LESSEE to LESSOR hereunder, a sum so that the net payment for the eighty-seven hundred and fifty (8750) EHP "firm power" shall at all times equal the sum of Seventy-six Thousand Dollars ($76,000) per annum, the payment of which sum annually shall be made in equal quarter-yearly payments of Nineteen Thousand Dollars ($19,000) each on the last day of March, June, September and December in each year, in gold coin of the United States of the standard of weight and fineness of the year 1890, or the equivalent of this commodity in United States currency, at the option of LESSOR. Payments for any "variable power" to be taken, measured and ascertained as hereinbefore specified, shall be made on the 15th day of each and every month in respect to any "variable power" for which LESSEE shall be obligated to pay hereunder for the preceding calendar month.

645 In case, however, any tax, rental or charge shall be directly or indirectly levied, assessed or imposed by federal, state or other governmental authority during the term of this agreement

(1) upon the development of any such power or the generation or transmission of any such electric energy, and/or

(2) upon the right of LESSOR, its successors or assigns, so to develop power or to generate or transmit electric energy, and/or

(3) upon the use of the waters of the Niagara River for such development or generation,

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the proportionate amount of such tax, however made, applicable to the amount of "variable power" supplied and transmitted hereunder shall be added to the rental reserved, and compensation for transmission above specified, in respect to such "variable power" and shall be payable by LESSEE to LESSOR either in such monthly installments or as shall be otherwise mutually agreed upon, but it is not intended hereby to include any tax now fixed by law, nor shall this provision in respect to the addition of such tax, rental or charge be applicable to the "firm power" to be supplied hereunder.

ARTICLE X: This grant of LESSOR is upon the express condition that if it shall happen that said net rental for said electric energy and compensation for the transmission thereof, or any part of the said rental or compensation shall not be paid on any day when the same
646 ought to be paid as aforesaid, and if such default shall continue for ninety (90) days after notice thereof shall be given to LESSEE by mailing the same through the Post Office in Niagara Falls or by posting the same in a conspicuous place upon the granted premises, or by serving the same personally upon the President or Treasurer of LESSEE, then and in every such event it shall and may be lawful for LESSOR, its successors and assigns, to terminate any and all rights of LESSEE in respect to such supply and transmission of electric energy hereunder at a date to be fixed in such notice of default, not less than ninety (90) days from the date of service thereof, and this agreement and all rights of LESSEE hereunder shall in such event terminate at the date fixed in such notice, and such termination shall not be deemed to restore in any respect any right of LESSEE under the deed and/or lease of March 7, 1896, hereinbefore by this agreement surrendered. But if LESSEE shall before the end of ninety (90) days after service of such notice of default pay the sum then due under this agreement, with interest thereon, such

notice shall be deemed to be of no effect and shall be considered as having never been served. Any claim or demand which LESSEE may have or claim to have against LESSOR shall not be an offset or counter-claim against any payment due LESSOR under this agreement, but such claim or demand of LESSEE shall, if disputed be the subject of suit against or further adjustment by LESSOR.

647 ARTICLE XI: In case either party shall fail in the performance of any of its covenants or agreements hereunder (other than the covenant of payment, in respect of which provision is made in ARTICLE X hereof), the other party, in addition to any other remedies herein provided, may maintain an equitable action for the specific enforcement of such covenant, or may serve a written notice upon the party in default, requiring it to remedy such default, and perform its said covenants by a date to be fixed therein, not less than ninety (90) days from the service of such notice, and in case the party in default shall not have remedied such default and performed its said covenants hereunder, so complained of, by the date specified in such notice, the other party may terminate this agreement at or promptly after the said date, by written notice of such termination.

Any termination of this agreement under the provisions of this ARTICLE XI or ARTICLE X hereof, shall in no way affect any liability of either party hereto for the payment of any sums of money that may have become due and payable by them respectively, or for any damages that may accrue up to the date of such termination.

ARTICLE XII: Inasmuch as this is and is intended to be the corporate obligation of both parties hereto, their respective successors and assigns, all individual liability of the stockholders, directors and officers of said corporations is hereby expressly waived, and no party or person claiming hereunder shall at any time or place allege or
648 assert any individual liability as against any pres-

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ent or future stockholder, officer or director of either of the parties in respect of any obligation or default under this agreement, or any judgment thereon, either directly or through such corporation, and no recourse for any obligation or default hereunder shall be directly or indirectly had against any stockholder, director or officer of either of said parties.

ARTICLE XIII: Any and all notices in writing, contemplated by any of the provisions of this agreement, to be given by either party to the other, shall be served personally on the President or Secretary of the party to be notified, residing in the United States, or by mailing, through the United States Post Office, a copy thereof in a registered envelope, duly addressed to the party to be notified, at Niagara Falls, New York. In the event of service by mailing, the date of service shall be, and be construed to be, the date on which said copy is deposited in the Post Office in a registered envelope, duly addressed as aforesaid. The Post Office registry receipt showing the deposit of such registered envelope, and the date of such deposit, shall be *prima facie* evidence of mailing, to be supplemented by evidence of the contents of such envelope.

ARTICLE XIV: This agreement, so far as it relates to the delivery of electric energy by LESSOR, is in all respects subject to the reservations, limitations and conditions, terms and provisions contained respectively in the following mortgages, or deeds of trust, made by the constituent companies of LESSOR, viz.:

649

1. Mortgage or Deed of Trust, executed by The Niagara Falls Power Company (constituent) to Central Trust Company of New York, (now Central Union Trust Company of New York) as Trustee, dated April 29, 1891, and mortgages supplemental thereto and confirmatory thereof.

2. Mortgage or Deed of Trust executed by The Niagara Falls Power Company (constituent) to Bankers Trust Company (of New York) as Trustee, dated October 1, 1909.

3. Mortgage or Deed of Trust executed by Hydraulic Power Company of Niagara Falls to Commonwealth Trust Company, (now Bank of Buffalo) of Buffalo, as Trustee, dated July 1, 1910.

4. Mortgage or Deed of Trust executed by Hydraulic Power Company of Niagara Falls to Bankers Trust Company of Buffalo, (now The Marine Trust Company of Buffalo), as Trustee, dated October 1, 1916.

LESSEE will upon due notice of any default under said mortgages or either of them, and at all times during the continuance of such default, pay all rents reserved, and/or other sums accruing to LESSOR under the terms of this agreement, directly to the respective Trustee or Trustees under any of said mortgages, legally entitled under the terms thereof to such payments for the benefit of the holders of the bonds respectively secured thereby.

ARTICLE XV: The initial taking of electric energy hereunder shall be not earlier than March 1, 1919, and this agreement shall continue in force and effect so long as LESSOR shall continue to divert or shall be entitled to divert water from the Niagara River for use in the de-
650 velopment of power, it being expressly understood that no notices of renewal as required by said lease of March 7, 1896, shall be hereafter given or required in respect to electric energy to be supplied and transmitted hereunder, in order to continue the obligation of either party under this agreement.

ARTICLE XVI: This agreement shall run to and bind the successors and assigns of the respective parties.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be subscribed by their proper officers thereunto duly authorized, and their corporate seals, attested by their respective corporate Secretaries, to be hereunto affixed, all as of the day and year first above written.

THE NIAGARA FALLS POWER COMPANY,
By PAUL A. SCHOELLKOPF,
President.

(Seal)

Attest:

F. L. LOVELACE,
Secretary.

INTERNATIONAL PAPER COMPANY,
By PHILIP T. DODGE,
President.

(Seal)

Attest:

F. G. SIMONS,
Secretary.

[Acknowledgments omitted from printing.]

Hearing Exhibit No. 14.

654 MEMORANDUM OF AGREEMENT.

Made and executed, in duplicate, as of the first day of August, 1937.

BY AND BETWEEN:

THE NIAGARA FALLS POWER COMPANY, a corporation of New York, having its principal place of business at Niagara Falls, New York (hereinafter called "POWER COMPANY"),

Party of the First Part,

AND

INTERNATIONAL PAPER COMPANY, a corporation of New York, having its principal place of business at Corinth, New York, and owning a plant in the City of Niagara Falls, New York (hereinafter called "PAPER COMPANY"),

Party of the Second Part.

655 WHEREAS, Power Company was organized through the consolidation, effective October 31, 1918, of certain corporations, among which was another corporation of the same name, which latter corporation is sometimes hereinafter called "constituent company"; and

WHEREAS, prior to the 1st day of March, 1919, Paper Company, as successor in interest to Niagara Falls Paper Company, a corporation of the State of Illinois, formerly called "The Soo Paper Company", owned and possessed certain rights to draw and take water of the Niagara River for use in the development of power upon the Paper Company's premises, and to discharge such water into the tail race tunnel of Power Company (hereinafter called "Paper Company's water rights"), upon the payment of certain annual sums for the exercise of such rights under a certain deed dated March 7, 1896, and a lease of even date therewith executed and delivered by and between the constituent company and the said Niagara Falls Paper Company, and

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an agreement dated June 1, 1898, executed and delivered by and between the constituent company and Paper Company; and

WHEREAS, as of the 1st day of March, 1919, Power Company and Paper Company entered into a certain agreement bearing that date (hereinafter called "the 1919 Agreement") wherein and whereby Paper Company, for the consideration and for the period and upon the con-
656 ditions therein described, granted and released to Power Company Paper Company's water rights; and

WHEREAS, the 1919 Agreement also constituted an agreement for the supplying by Power Company and the taking by Paper Company of electric energy, containing numerous provisions relating to such supplying and taking, and provided that the consideration payable to Paper Company by Power Company for Paper Company's said release of Paper Company's water rights should be paid by Power Company by way of granting a credit upon sums which should become payable by Paper Company for such electric energy, with the result that during the period since the execution and delivery of the 1919 Agreement, Power Company has yearly allowed as such credit to Paper Company the sum of $99,000 representing the appraisement of the parties of the fair and reasonable use or rental value of Paper Company's water rights; and

WHEREAS, on July 2, 1937, and during the pendency of a proceeding before the Public Service Commission, Case No. 9002, instituted on motion of said Commission as to the rates, charges, classifications or regulations of Power Company, Power Company filed with said Public Service Commission a schedule for electric service covering service classification No. 1, P. S. C. No. 6, under which all agreements and contracts for the supplying and taking of
657 hydro-electric power are required to take the form set forth on Original Leaves Nos. 12 and 13 of such schedule and designated "Agreement for hydro-electric

power, Form A", and such "Form A" provides that such supplying and taking shall be uniformly upon the terms and conditions contained in the rules and regulations and the said service classification set forth in said schedule for electric service, and also provides that such agreement "shall supersede any and all provisions of agreements between the Company (meaning Power Company) and the Consumer relating to the supplying and taking of electric power or electric energy", dated prior to such agreement; and

WHEREAS, Paper Company and Power Company have executed under even date and delivered an agreement in the required form as above stated covering the supplying and taking of hydro-electric power by Paper Company, thereby superseding all of the provisions of the 1919 Agreement relating to the supplying and taking of electric power or electric energy, but not superseding the other provisions of the 1919 Agreement; and

WHEREAS, such action by the parties leaves in some doubt and uncertainty the force and effect of certain of the provisions of the 1919 Agreement and particularly those with respect to the grant and release to Power Company of Paper Company's water rights, the terms of payment
658 therefor and the extent, duration and effect thereof, and the parties desire to resolve and clarify such doubt and uncertainty, thus guarding against future conflicting claims and possible litigation with respect thereto;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, THAT, in view of the premises, the parties hereto, each in consideration of the covenants and agreements of the other herein contained, have agreed and do hereby agree with each other as follows:

1. The provisions of the 1919 Agreement relating to the supplying and taking of electric power or energy which are superseded by said agreement of even date and are

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accordingly cancelled as from the first day of August, 1937, are the following: Articles I to VII, both inclusive, and Articles X, XI, XIV and XV of the 1919 Agreement.

2. Articles VIII and IX of the 1919 Agreement are hereby stricken out and the following substituted therefor:

"ARTICLE VIII: Upon condition that and so long as Lessor shall continue to divert or shall be entitled to divert water from the Niagara River for use in the development of power, but subject to Lessee's right of termination provided in subdivision (c) of Article IX hereof, Lessee hereby grants and releases to Lessor every and all right which Lessee now has under the aforesaid deed of constituent company to Niagara
659 Falls Paper Company of March 7, 1896, and/or under the lease of said constituent company to Niagara Falls Paper Company under date of March 7, 1896, and/or under any other grant or agreement of constituent company or of Lessor to draw from the Niagara River and/or the main canal of constituent company, any water for use in the development of power, and Lessor may take and use any water or flowing waters which Lessee has heretofore had or claimed the right so to use in the development of power and use the same through any of Lessor's own penstocks, flumes, canals, water-wheels and tail-races for the purpose of developing hydraulic power from which to generate electric energy. The Lessor shall have the right to close any gate or gates or to build any structure or structures, or to remove any existing structures, the closing, construction or removal of which, in the judgment of Lessor, may be necessary to enable it to receive the full benefit and use of the water rights so surrendered to it by Lessee so long as said grant and release of the right to take water continue.

"ARTICLE IX: (a) During such period as Lessor shall continue to divert or shall be entitled to divert water from the Niagara River for use in the development of power, Lessor agrees to pay to Lessee annually, in monthly instalments as hereinafter provided, a sum equal to the fair and reasonable annual use or

rental value of the right to put to its most favorable
660 use in the City of Niagara Falls at the Niagara Falls head such amount of water as will produce power equivalent to 8,750 horse power continuously. Such fair and reasonable annual use or rental value shall be determined by the following formula, namely: by multiplying 6539.6 by the current market price per kilowatt per year from time to time of hydro-electric power supplied and taken within the City of Niagara Falls and deducting $76,000 from the product so obtained, provided that for the five year period beginning August 1, 1937, the annual amount so payable shall be $99,000. For the purposes of the foregoing "current market price" shall mean the price being paid from time to time by industrial consumers for hydro-electric power at rates of taking not less than 1,000 kilowatts, and "hydro-electric power" shall mean electric energy generated from hydraulic power substantially of the class described in the Lessor's schedule for electric service covering service classification No. 1, P. S. C. No. 6, filed with the Public Service Commission on July 2, 1937 and effective August 1, 1937. The annual amount so to be paid by Lessor shall be payable monthly in equal instalments on the first day of each month beginning with a payment on September 1, 1937, in respect of the month of August 1937. Any change in the annual rate of payment by Lessor to Lessee which, under the foregoing provisions, would take effect during any calendar month shall not be deemed effec-
661 tive until the first of the succeeding calendar month.

"(b) If, for any reason, it shall be legally impossible to determine by the formula contained in subdivision (a) of this Article the fair and reasonable annual use or rental value of the right to put to its most favorable use in the City of Niagara Falls at the Niagara Falls Head such amount of water as will produce power equivalent to 8,750 horse power continuously, it shall be determined by arbitration as hereinafter provided. Each such determination by arbitration shall be for a five year period, but the determination so made shall continue in force and effect after the expiration of such five year period, unless and until either party shall notify the other in writing that a further de-

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termination is desired. Such arbitration shall be by a board of arbitrators, one member of which shall be appointed by each of the parties hereto and the third chosen by the two thus appointed, or in the event of failure of either party to appoint an arbitrator within thirty (30) days of service of notice in writing from the other requesting such appointment, or in the event of failure of the arbitrators so appointed to choose a third within thirty (30) days after the appointment of both of them, the second and/or third arbitrator shall be appointed by the Supreme Court of the State of New York under the Arbitration Law of said state.
662 The appointment of each of such arbitrators shall not be subject to revocation by either party hereto. The arbitration shall proceed as follows: after the appointment of the third arbitrator shall have been made, the two arbitrators first appointed shall meet and review the controversy upon presentation of the matter in dispute by each party thereto and attempt to arrive, without formal proceedings, at a joint decision. If they shall succeed in so doing, a determination shall be forthwith made without participation by the third arbitrator. If agreement cannot be reached between the two arbitrators first appointed completely disposing of the controversy, the three arbitrators shall meet upon due notice given to each party hereto to present its case and witnesses, if any, in the presence of the other at the time stated in such notice. After hearing both parties at the time so appointed and/or upon adjourned dates, if adjournment shall be ordered by majority vote of the arbitrators, the three arbitrators shall proceed to make a determination in writing which may be by majority vote of the three arbitrators. For the purpose of such determination the most favorable use of such water shall not be deemed to be a more efficient use than the use of which the Lessor's most efficient works located within the City of Niagara Falls are then capable. Any determination so made shall be binding upon both parties hereto and shall be enforceable under the provisions of said Arbitration
663 Law, which is hereby made applicable to this agreement and the conduct of the arbitrators acting pursuant thereto.

"(c) If Lessor shall cease to divert and shall cease to be entitled to divert water from the Niagara River for use in the development of power, the grant and release of water rights contained in Article VIII hereof shall cease and determine, and if Lessor shall be in default for a period of more than thirty (30) days after written demand by Lessee in making the payments provided for in this Article IX said grant and release may, at the election of Lessee be terminated. Such election shall be exercised by notice in writing to Lessor and shall be without prejudice to Lessee's enforcement at law or in equity of any rights of Lessee arising out of such default prior to such termination. In case of said grant and release ceasing and determining as aforesaid or being terminated by Lessee as aforesaid, the mutual rights and obligations of the parties (exclusive of any such right of Lessee at law or in equity) from and after such termination shall be determined under and pursuant to the deed dated March 7, 1896, the lease of even date therewith and the renewal agreement dated June 1, 1898 referred to in the recitals hereto in and of themselves without subtraction from, addition to or modification of said deed, lease and renewal agreement by anything contained in this Agreement, and in all respects as if this Agree-
664 ment had never been executed, delivered or complied with."

3. Article XVI of the 1919 Agreement is hereby stricken out and the following substituted therefor:

"ARTICLE XVI: This Agreement shall run to and bind the successors and assigns of the respective parties, and the respective rights and obligations of the parties shall be as set out in this Agreement irrespective of the fact that Lessee is taking and paying for electric power supplied by Lessor and of whether or how long Lessee shall continue so to do."

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their proper officers thereunto duly authorized and their respective corporate seals to be

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hereunto affixed, all as of the day and year first above written.

(Seal)

Attest:
CHARLES D. WARREN
Sec.

THE NIAGARA FALLS POWER COMPANY,
By W. KELLY, *Vice-President*
INTERNATIONAL PAPER COMPANY,
By W. N. HURLBUT, *Vice-President.*

(Seal)

Attest:
COULTER D. YOUNG
Secretary

[Acknowledgments omitted from printing.]

Hearing Exhibit No. 15.

666 THE NIAGARA FALLS POWER COMPANY
Niagara Hudson
Buffalo, N. Y.

December 19, 1947

Federal Power Commission
Hurley-Wright Building
Washington 25, D. C.

Re: The Niagara Falls Power Company—Project No. 16

Gentlemen:

Under date of November 22, 1947 we received a copy of an order denying application for amendment of license for elimination from paragraph 13 of the license of a reference to certain water rights held on March 2, 1921 by the Pettebone-Cataract Paper Company and Cataract City Milling Company, together with a copy of an opinion of your Commission designated No. 159.

The Niagara Falls Power Company advises you that, while it does not agree with the reasoning or conclusions contained in Opinion No. 159, no application for rehearing will be made from the order denying the application for amendment of license and that the application will not be renewed at this time.

It is the Company's position that its failure to apply for a rehearing or to renew the application is without prejudice to its right to contest the legal conclusions contained in Opinion No. 159, should the matter arise in concrete form in any subsequent proceeding.

Very truly yours,

A. T. O'NEILL,
President.

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Hearing Exhibit No. 20.

730 LICENSEE'S SCHEDULE NO. 3

THE NIAGARA FALLS POWER COMPANY

RESULTS OF OPERATIONS—PROJECT NO. 16

FOR THE PERIOD MARCH 2, 1941 TO DECEMBER 31, 1941 AND FOR THE CALENDAR YEARS 1942 TO 1946, INCLUSIVE

	Period March 2 To December 31, 1941	Year 1942	1943	1944	1945	1946	Total
Project No. 16 Operating Income as per Schedule 3 of Revised Staff Report dated February 23, 1949	$2,480,131.61	$2,600,032.64	$2,298,684.44	$1,952,641.25	$2,027,324.21	$2,689,387.25	$14,048,201.40
Deduct or (add) items which are the subject of exception by the Licensee to the Staff's determination of Project No. 16 operating income:							
(1) Staff's inclusion as operating revenues of revenues in excess of those billed under the terms of an existing contract between the Licensee and Buffalo Niagara Electric Corporation (as successor to Niagara, Lockport and Ontario Power Company) with respect to the use by Licensee of certain rights in 262.6 c.f.s. of water at a head of 100 feet formerly owned by the so-called Pettebone-Cataract interests (Exception No. 3)	31,500.00	37,800.00	37,800.00	37,800.00	37,800.00	37,800.00	220,500.00
(2) Staff's exclusion as an item of production expenses the payments made by Licensee to International Paper Company for the grant and release to Licensee of water rights vested in International Paper Company (Exception No. 4)	82,500.00	99,000.00	99,000.00	99,000.00	99,000.00	99,000.00	577,500.00
(3) Staff's failure to adjust Federal income tax for the years 1943 to 1946, inclusive, upon allocating a payment for New York State water charge in the year 1946 in the amount of $1,750,000 to the years 1943, 1944 and 1945 in the amounts of $350,000, $700,000 and $700,000 respectively (See Licensee's Schedule No. 3-T, and Exception No. 5)			(100,626.10)	(201,252.20)	(201,252.20)	503,130.50	
Project No. 16 Operating Income as determined by Licensee	$2,366,131.61	$2,463,232.64	$2,262,510.54	$2,017,093.45	$2,091,776.41	$2,049,456.75	$13,250,201.40

731 LICENSEE'S SCHEDULE No. 3-T

THE NIAGARA FALLS POWER COMPANY

COMPUTATION OF ALLOCATION OF FEDERAL INCOME ADJUSTMENTS AMONG THE YEARS 1943, 1944, 1945 AND 1946 BY REASON OF PAYMENT OF NEW YORK STATE WATER CHARGE IN 1946 APPLICABLE TO THE OTHER THREE YEARS

Taxable income for the year 1946 per Schedule F-3 (3 of 3) of Federal Power Commission Staff working papers	($ 425,972.37)
Add: New York State water charge paid in the year 1946 applicable to prior years which was deducted in arriving at taxable income for 1946	1,750,000.00
Taxable income for the year 1946, revised to exclude the above payments	$1,324,027.63
Federal income tax at 38% of revised taxable income	$ 503,130.50

Allocation of Revised Federal Income Tax

1943	$ 350,000.00	20%	$100,626.10	Tax decrease—1943
1944	700,000.00	40%	201,252.20	Tax decrease—1944
1945	700,000.00	40%	201,252.20	Tax decrease—1945
	$1,750,000.00	100%	$503,130.50	Tax increase—1946

Note: Amount in parenthesis represents red figure.

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LICENSEE'S SCHEDULE NO. 4

THE NIAGARA FALLS POWER COMPANY

COMPUTATION OF RATE OF RETURN—PROJECT NO. 16

FOR THE PERIOD MARCH 2, 1941 TO DECEMBER 31, 1946, INCLUSIVE

Period	Base (Note 1)	Operating Income (Per Licensee's Schedule No. 3)	Return Rate %	Specified Return 6%	Excess Or (Deficiency) Of Operating Income Over Specified Return
March 2 to December 31, 1941 ..	$46,957,177.68	$ 2,366,131.61	5.04	$ 2,347,858.88	$ 18,272.73
Year 1942	47,252,759.24	,463,232.64	5.21	2,835,165.55	(371,932.91)
Year 1943	47,612,130.01	2,262,510.54	4.75	2,856,727.80	(594,217.26)
Year 1944	47,741,977.20	2,017,093.45	4.22	2,864,518.63	(847,425.18)
Year 1945	47,521,670.07	2,091,776.41	4.40	2,851,300.20	(759,523.79)
Year 1946	47,361,812.19	2,049,456.75	4.33	2,841,708.73	(792,251.98)
March 2, 1941 to December 31, 1946 (aggregate)	$284,447,526.39	$13,250,201.40		$16,597,279.79	($3,347,078.39)

Note 1: Base is the sum of: Average Plant Investment (from Schedule No. 4-A of Revised Staff Report), Average Materials and Supplies (from Schedule No. 4-C of Revised Staff Report), and 12½% of Operating Expenses as computed by Licensee. Operating Expenses as computed by Licensee are the amounts shown in Column (4) of Schedule No. 4-D of the Revised Staff Report, increased by the respective amounts paid by Licensee to International Paper Company (Item (2) of Licensee's Schedule No. 3).

* * * * * * * * *

Items by Reference.

Item C.

Excerpts from the Record of the Proceeding EP-16, 6 FPC 184.

1042 BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

THE NIAGARA FALLS POWER COMPANY (Application for Amendment of License filed February 17, 1947, as supplemented March 20, 1947)

Project No. 16

Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the Applicant, The Niagara Falls Power Company, and the staff of the Federal Power Commission in the above-entitled proceeding, that the record in this proceeding shall include:

A. The Application herein, filed February 17, 1947, and Exhibits annexed thereto;

B. Applicant's letter to the Federal Power Commission, dated March 17, 1947 and filed March 20, 1947;

C. The Minutes of Oral Argument before the Commission on June 18, 1947;

D. The following Applicant's Exhibits:

Applicant's Exhibit 1. Holding Company Act of 1935 Release No. 7246, Securities and Exchange Commission, March 3, 1947 (comprising Order of February 28, 1947 in File No. 70-1456, *Matter of Buffalo Niagara Electric Corporation and The Niagara Falls Power Company*).

1043 Applicant's Exhibit 2. Air photograph of a portion of the City of Niagara Falls.

Applicant's Exhibit 3. Photograph of the "Gaskill Mill", taken about 1875.

Applicant's Exhibit 4. Photograph of the High Bank and Milling District, taken in 1895.

Applicant's Exhibit 5. Photograph of the High Bank and Milling District, taken in 1907 (from H. R. Doc. No. 246, 62d Congress, 2d Session, *Preservation of Niagara Falls,* Photograph A).

Applicant's Exhibit 6. Photograph of the High Bank and Schoellkopf Station, showing conditions existing in 1947.

Applicant's Exhibit 7. Map showing the Hydraulic Canal Basin as of 1899.

Applicant's Exhibit 8. Opinion of the Supreme Court of the State of New York, Niagara Special Term, July, 1920, in *Hydraulic Power Company of Niagara Falls* v. *Pettebone-Cataract Paper Company,* reported in 112 Misc. 528, and Opinion of the Supreme Court, Appellate Division, Fourth Department, in the same case, November 23, 1921, reported in 198 App. Div. 644.

Applicant's Exhibit 9. Application of The Niagara Falls Power Company for a License under the Federal Water Power Act of 1920, filed January 3, 1921, and Exhibits thereto.

1044 Applicant's Exhibit 10. Reproduction of Exhibit "F", Sheet No. 3 to Application and License.

Applicant's Exhibit 11. Reproduction of Exhibit "F", Sheet No. 11, to Application and License.

Applicant's Exhibit 12. Extract from Minutes of Hearing before the Federal Power Commission, January 24-26, 1921.

Applicant's Exhibit 13. Project No. 16 License, as issued March 2, 1921.

Applicant's Exhibit 14. Extract from Amendment No. 1 to License, Project No. 16, dated April 7, 1922.

Applicant's Exhibit 15. Exhibit F, Sheet No. 3-A to License, Project No. 16.

Applicant's Exhibit 16. Extract from Report of the American Members of the International Waterways Commission regarding the Preservation of Niagara Falls, March 19, 1906, paragraph 8, subparagraph I.

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Applicant's Exhibit 17. Extract from Statement and Application of the Niagara Falls Hydraulic Power and Manufacturing Company to the Secretary of War Respecting the Diversion of Water in the United States from Niagara River, July 9, 1906.

1044-A Applicant's Exhibit 18. Extract from Report by Charles W. Kutz, Captain, Corps of Engineers, U. S. Army, to the Chief of Engineers, October 5, 1906 (attached to the Report of the American Members of the International Waterways Commission to the Secretary of War, dated November 15, 1906).

Applicant's Exhibit 19. Permits to the Niagara Falls Hydraulic Power and Manufacturing Company, Hydraulic Power Company of Niagara Falls, and The Niagara Falls Power Company under the Burton Act (34 Stat. L. 626) and extensions thereof, and Congressional Joint Resolutions:

a. Permit of August 16, 1907.

b. Permit of September 2, 1911.

c. Permit of April 23, 1912.

d. Opinion of Attorney-General of the United States, April 30, 1913.

e. Permit to Hydraulic Power Company of Niagara Falls, January 19, 1917.

f. Letter of Secretary of War extending permit to June 30, 1917.

g. Permit to Hydraulic Power Company of Niagara Falls, July 1, 1918.

h. Permit to The Niagara Falls Power Company, July 30, 1919.

Applicant's Exhibit 20. Extract from the "Warren Report", *Diversion of Water from the Great Lakes and Niagara River* (transmitted by the Secretary of War to the Speaker of the House of Representatives, December 7, 1920), page 299, relating to Pettebone-Cataract Paper Co.

1045 Applicant's Exhibit 21. Opinion No. 77 of Federal Power Commission, Order of June 9, 1942, and Order of December 28, 1943, *In the Matter of The Niagara Falls Power Company, Project No. 16* (determining actual legitimate original cost and prescribing accounting therefor).

E. The following exhibits of the Staff of the Commission:

Staff's Exhibit A. Written Objection of The Niagara Falls Power Company addressed to Federal Power Commission, dated January 24, 1921.

Staff's Exhibit B. Extracts from Minutes of Sixteenth Meeting of Federal Power Commission, February 28, 1921 (being such portions of the minutes as relate to the Niagara River and applications for diversion of water therefrom, as printed in the First Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1921, at pages 107-108 and 108-110).

Staff's Exhibit C. The license for Project No. 16, issued to The Niagara Falls Power Company on March 2, 1921, as amended December 13, 1926, and as supplemented by the Commission's order dated April 23, 1946 authorizing temporary diversion and use of 275 cfs of water by licensee through Project No. 16.

Dated July 24, 1947.

RANDALL J. LEBOEUF, JR.,
Attorney for The Niagara Falls Power Company, Applicant.
WILLARD W. GATCHELL,
Attorney for the Staff of the Federal Power Commission.

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957 BEFORE THE FEDERAL POWER COMMISSION

Application for Amendment of License

Dated: February 14, 1947

1. The Niagara Falls Power Company, a corporation organized and existing under the laws of the State of New York, licensee for a power project, designated as Project No. 16 in the records of the Federal Power Commission, issued on the 2nd day of March, 1921, hereby makes application to said Commission for an amendment of the license for said project in the manner and to the extent described herein.

2. Applicant licensee proposes to acquire from Buffalo Niagara Electric Corporation certain rights to take and withdraw from the Hydraulic Basin of the licensee and to use under a head not exceeding one hundred (100) feet, two hundred and sixty-two and six tenths (262.6) cubic feet seconds of water.

Applicant licensee proposes to pay to Buffalo Niagara Electric Corporation therefor the amount of $728,415.48, being the original cost of said water rights to Niagara, Lockport and Ontario Power Company, predecessor to Buffalo Niagara Electric Corporation.

Said water rights were acquired by Niagara, Lockport and Ontario Power Company, predecessor corpora-
958 tion to Buffalo Niagara Electric Corporation, from Cataract City Milling Company and The Pettebone-Cataract Paper Company in 1925, and were thereafter in said year leased by Niagara, Lockport and Ontario Power Company to the applicant licensee.

Said water rights are referred to in Paragraph 13 of the applicant's License, Project No. 16, as follows (such reference being indicated herein by italics):

"Such taking over of the project shall also be subject to *the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic Canal or basin of licensee,* and to the rights, if any, of International Paper Company."

Applicant licensee has utilized said water rights, leased to it by Niagara, Lockport and Ontario Power Company (Buffalo Niagara Electric Corporation, successor corporation), since on or about May 1, 1925.

By effect of the proposed transfer, applicant licensee will become the full owner of the right to use said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water for power purposes in its Project No. 16.

959 No changes in tangible project property will be required by effect of the proposed acquisition of water rights; and the water subject to said rights will continue to be used through the existing structures and machinery of the applicant licensee.

Applicant licensee, therefore, desires and requests that its License, Project No. 16, and Paragraph 13 thereof, be amended so that there be substituted for the above quoted paragraph a paragraph to read as follows:

"Such taking over of the project shall also be subject to the rights, if any, of International Paper Company."

3. The proposed changes are necessary and desirable for the following reasons:

The proposed transfer of water rights and acquisition thereof by the applicant licensee will vest in applicant licensee full ownership of the use of said two hundred and sixty-two and six-tenths (262.6) cubic feet seconds of water which are a part of the nineteen thousand, seven hundred and twenty-five (19,725) cubic feet seconds of water authorized to be diverted by applicant licensee from the Niagara River for power purposes under its License, Project

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No. 16. Such transfer and acquisition of water
960 rights will eliminate an outstanding interest in a limited and partial use of this portion of the waters diverted from the Niagara River and used for power purposes by the applicant licensee under its said License.

4. Attached hereto for information of the Commission as Exhibit A is copy of application relating to the subject matter herein as filed with the Public Service Commission of the State of New York.

5. The transfer of rights from Buffalo Niagara Electric Corporation to applicant has been approved by the Public Service Commission of the State of New York. Attached hereto as Exhibits B and C respectively are the opinion and order of said Commission in its Case 12727.

6. Attached hereto as Exhibit D is copy of letter dated December 31, 1946 extending effective date of letter agreement between licensee and Buffalo Niagara Electric Corporation providing for transfer of said water rights to and including April 15, 1947.

961 In witness whereof the applicant has caused its name to be hereunto signed by A. T. O'Neill, one of its Vice-Presidents, and its corporate seal to be hereto affixed by Walter S. Schmidt, its Secretary, thereunto duly authorized, this 14th day of February, 1947.

The Niagara Falls Power Company,
By A. T. O'Neill,
Vice-President.

(Seal)

Attest:

Walter S. Schmidt,
Secretary.

962 STATE OF NEW YORK } ss.
COUNTY OF ERIE }

A. T. O'NEILL, being first duly sworn deposes and says: That he is one of the Vice-Presidents of THE NIAGARA FALLS POWER COMPANY, the applicant for an amendment to the License for Project No. 16, that he has read the foregoing application and knows the contents thereof; that the same are true to the best of his knowledge and belief.

A. T. O'NEILL.

Subscribed and sworn to before me this 14th day of February, 1947.

JACOB SICHERMAN
Jacob Sicherman,
Notary Public

In and for Erie County, New York. My Commission expires Mar. 30, 1947. Reg. No. 651.

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963 EXHIBIT A (To Application)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the

Petition of BUFFALO NIAGARA ELECTRIC CORPORATION for consent to the transfer of certain water rights to THE NIAGARA FALLS POWER COMPANY, which corporation joins in this petition.

To the Honorable Public Service Commission of the State of New York:

The petition of BUFFALO NIAGARA ELECTRIC CORPORATION, in which THE NIAGARA FALLS POWER COMPANY joins, respectfully alleges and shows:

1. Buffalo Niagara Electric Corporation (hereinafter sometimes referred to as "Buffalo Electric") is a domestic corporation organized and existing under the laws of the

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State of New York. A certified copy of the Certificate of Consolidation, dated March 29, 1937, forming Buffalo Electric was filed with your Commission in Case No. 9091; a certified copy of the Certificate of Consolidation, dated October 29, 1945, consolidating Buffalo Electric, Niagara, Lockport and Ontario Power Company, The Lockport and Newfane Power and Water Supply Company and Buffalo, Niagara and Eastern Power Corporation was filed with your Commission in Case No. 11748; and a certified copy of a Certificate, dated January 8, 1946, Pursuant to Section 11 of the Stock Corporation Law, was filed with your Commission in Case No. 12246. There have been no
964 further or other amendments thereto.

2. The Niagara Falls Power Company ("Niagara Power") is a corporation organized and existing under the laws of the State of New York. Its Joint Agreement of Consolidation was filed, pursuant to Chapter 596 of New York Laws of 1918, in the office of the Secretary of State of New York on October 31, 1918. A certified copy of said Joint Agreement of Consolidation and certain amendments thereto have heretofore been filed with your Commission in Cases Nos. 6453 (2d Dist.), 6967 (2d Dist.), 5304, 8796, and 11407; and a certified copy of a Certificate of Change of Number of Directors of The Niagara Falls Power Company pursuant to Section 5 of the Stock Corporation Law, filed in the Department of State, State of New York, on June 9, 1944, is annexed hereto as Exhibit A hereto.

3. The address of Buffalo Electric and of Niagara Power is No. 535 Washington Street, Buffalo, New York. The name of counsel to petitioners is LeBoeuf & Lamb, whose address is No. 15 Broad Street, New York, New York.

4. A statement of the financial condition of Buffalo Electric in accordance with Rule VI of the Rules of Procedure of your Commission is annexed hereto and made a part hereof as Exhibit B.

5. A statement of the financial condition of Niagara Power in accordance with Rule VI of the Rules of Procedure of your Commission is annexed hereto and made a part hereof as Exhibit C.

6. Buffalo Electric proposes to sell to its wholly-
965 owned subsidiary Niagara Power certain rights to take 262.6 cubic feet per seconds ("c.f.s.") of water from the Hydraulic Basin of Niagara Power in the City of Niagara Falls, New York, and to use such water under a head not exceeding 100 feet.

Said water rights, which are presently under lease from Buffalo Electric (as successor to Niagara, Lockport and Ontario Power Company) to Niagara Power and are utilized by the latter company for the development of hydroelectric power, are more fully described in Exhibit D annexed hereto and made a part hereof.

Buffalo Electric and Niagara Power have entered into an agreement for the sale and purchase of said water rights (subject to requisite consents or authorizations of regulatory authorities) dated and accepted September 16, 1946. A copy of said agreement is hereto annexed as Exhibit E and made a part hereof.

7. Buffalo Electric is successor by consolidation to Niagara, Lockport and Ontario Power Company. Said Niagara, Lockport and Ontario Power Company was successor by consolidation on January 3, 1928 to a predecessor corporation of the same name (herein referred to as "Niagara Lockport").

8. The history of prior transactions with respect to the water rights proposed to be sold and transferred is as follows:

Prior to the commencement of operation of The Niagara Falls Hydraulic Power and Manufacturing Company (predecessor of Niagara Power) in 1879, one Chesbrough had acquired certain mill-sites, adjacent to the Hydraulic

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966 Canal at Niagara Falls, New York, together with rights to divert specified amounts of water from the Hydraulic Canal and to use the same for the generation of power. Said mill-sites and water rights were thereafter acquired by Pettebone-Cataract Paper Company and Cataract City Milling Company, and said water rights were for many years prior to 1925 utilized by the said corporations. The amount of said water rights is 262.6 c.f.s., to be used at 100 feet of head; the taking and use of 34.8 c.f.s. thereof being subject to a yearly rental of $2400. In 1923, in a litigation in the Supreme Court of the State of New York between The Niagara Falls Power Company, plaintiff, and Pettebone-Cataract Paper Company and Cataract City Milling Company, defendants, involving among other things title to and use of said water rights, The Niagara Falls Power Company recovered judgment against said defendants in an amount (including interest) of approximately $172,000. Thereafter, in 1925, Niagara Lockport accepted an offer of Pettebone-Cataract Paper Company and Cataract City Milling Company whereby Niagara Lockport undertook to buy from the Pettebone-Cataract and Cataract City companies all the lands, water rights, buildings, plant, machinery and equipment owned by them at the Hydraulic Basin at Niagara Falls (including the water rights above mentioned), and in payment therefor to deliver $700,000 of 7% preferred stock of Niagara Lockport and to assume or procure the discharge of the said judgments. Thereafter, Niagara Power offered to purchase from Niagara Lockport the lands, buildings, plant, machinery and equipment in consideration of satisfaction of the said judgments; and further offered to lease

967 from Niagara Lockport the said water rights, in consideration for which Niagara Power would supply 2000 kw of alternating current electric energy as the equivalent of said water upon payment by Niagara Lockport of a charge initially fixed at $6.70 per kw per annum to cover costs of generation and transmission.

In Case No. 2427, the Public Service Commission, by order dated March 12, 1925, authorized the issue and delivery by Niagara Lockport of $725,000 par value of its 7% cumulative preferred capital stock to the Pettebone-Cataract and Cataract City companies in full payment of the above-mentioned lands, water rights, buildings, plant, machinery, and equipment, subject only to the lien of Niagara Power's judgments of approximately $172,000; consented to the leasing of the said 262.6 c.f.s. of water to Niagara Power for the period of its Federal License (expiring March 1, 1971) and any renewals thereof; and consented to the transfer by Niagara Lockport to Niagara Power of all the property authorized to be acquired from Pettebone-Cataract and Cataract City, other than the water rights. A copy of the Memorandum of the Accounting Division of the Commission in said Case No. 2427, dated March 11, 1925, is annexed as Exhibit F hereto and made a part hereof; and a copy of the Order of the Public Service Commission in Case No. 2427, dated March 12, 1925, is annexed as Exhibit G hereto and made a part hereof.

Thereafter Niagara Lockport accepted said Order, and pursuant to the authorizations thereof issued said amount of preferred stock, transferred said properties (other than water rights to Niagara Power, and leased said water
968 rights to Niagara Power. A copy of the Deed and Agreement of Niagara Lockport to Niagara Power, dated May 1, 1925, whereby Niagara Lockport conveyed said properties and leased said water rights, subject to certain reservations therein set forth, and Niagara Power agreed to supply 2000 kw of electric power, is annexed as Exhibit H hereto and made a part hereof.

9. Under the terms of the lease of said water rights referred to in Paragraph 4 above Niagara Power has since 1925 utilized the waters which are the subject of said water rights in its plant and works at the City of Niagara Falls, New York, for the generation of hydro-electric power under a head of approximately 215 feet. Niagara Power

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proposes to continue such use of said waters after consummation of the proposed transfer of Buffalo Electric's reversionary right therein, without change in such manner of utilization.

10. By effect of the proposed conveyance, the obligation of Buffalo Electric to pay an annual charge of $2400 per year to Niagara Power with respect to 34.8 c.f.s. of said water will be terminated. The obligation of Niagara Power to supply 2000 kw of electric power to Buffalo Electric, and the obligation of Buffalo Electric to pay $6.70 per kw per annum as generating and transmission cost thereof, will be terminated; and the petitioner companies propose that, concurrently with the delivery of a deed of said water rights, they will enter into a written contract, to be filed with this Commission, supplementing the Agreement between The Niagara Falls Power Company and Niagara, Lockport and Ontario Power Company (Buffalo Ni-
969 agara Electric Corporation, successor corporation) dated January 2, 1922, as amended or supplemented by instruments dated January 2, 1924, October 22, 1937 and June 14, 1946 and filed with the Commission as Contract No. 267 (old style), which new supplemental agreement will provide for the supply by Niagara Power to Buffalo Electric of 2000 kilowatts of additional "firm energy" under said Agreement of January 2, 1922 as so amended, at a rate of $26.80 per kilowatt per year.

11. No franchise, consent or right for the distribution or transmission of electric energy is proposed to be transferred by the agreement for which your Commission's approval is sought.

12. An inventory of the water rights proposed to be transferred, classified according to the system of accounts prescribed by your Commission, applicable to Buffalo Electric, and showing the original cost, as defined, is annexed hereto and made a part hereof as Exhibit I. There is no deprecia-

tion or amortization reserve applicable to said water rights, which are classified in Account 320.

13. The cost of the water rights proposed to be transferred, as shown upon the balance sheet of Buffalo Electric, is $728,415.48.

14. There have been no contributions toward construction of the said property proposed to be sold.

15. The water rights proposed to be transferred are subject to the lien of the Mortgage Trust Indenture of Buffalo Electric made to The Marine Midland Trust Company of New York as Trustee, dated as of November 1, 1945, securing an issue of $56,929,000 principal amount of First Mortgage bonds, 2¾% Series due 1975. Buffalo Electric proposes to obtain a release of the said water rights from the lien of said indenture prior to or concurrently with the transfer of said rights to Niagara Power.

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16. Your petitioners, Buffalo Electric and Niagara Power believe that the transfer of ownership of the above described water rights to Niagara Power is in the public interest, since the said water rights are now utilized exclusively for the generation of hydro-electric power by Niagara Power, and the proposed transfer will vest full and complete rights to the use of said water in the corporation actually diverting and using the same for the generation of power.

17. The proposed transfer will be made the subject of a corresponding application to be filed by both petitioners with the Federal Securities and Exchange Commission, under Section 12(d) of the Public Utility Holding Company Act of 1935; and of such further application to the Federal Power Commission as may be necessary and appropriate under Part I of the Federal Power Act, to be filed by The Niagara Falls Power Company as licensee of

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Project No. 16. Neither of such applications have as yet been filed.

WHEREFORE, Buffalo Niagara Electric Corporation requests that it be permitted to transfer to The Niagara Falls Power Company the water rights referred to in Paragraph 6 of this petition and more fully described in Exhibit
971 D hereto, and that your petitioners be granted such other and further relief as may be just and proper.

Dated: September 16, 1946.

BUFFALO NIAGARA ELECTRIC CORPORATION
By A. T. O'NEILL, *President*

THE NIAGARA FALLS POWER COMPANY
By W. KELLY, *Vice-President*

* * * * * * * * * * *

995 EXHIBIT D (To Exhibit A to Application)

DESCRIPTION OF WATER RIGHTS

All rights of Buffalo Niagara Electric Corporation, successor in title and interest to Niagara, Lockport and Ontario Power Company, to take and draw water from the Hydraulic Basin of The Niagara Falls Power Company, and particularly all those rights to draw and use water for power and other purposes which were conveyed by Cataract City Milling Company and by The Pettebone-Cataract Paper Company, respectively, to Niagara, Lockport and Ontario Power Company, predecessor in title and interest to Buffalo Niagara Electric Corporation, by two certain deeds each dated April 30, 1925 and each recorded in the Niagara County Clerk's Office on May 2, 1925, the deed from The Pettebone-Cataract Paper Company being so recorded in Liber 505 of Deeds at Page 314 and the deed from Cataract City Milling Company being so recorded in Liber 505 of Deeds at Page 318, and which water rights were thereafter leased by Niagara, Lockport and Ontario Power Company to The Niagara Falls Power Company, under an Indenture

of Deed and Agreement dated May 1, 1925, made by and between Niagara, Lockport and Ontario Power Company and The Niagara Falls Power Company and recorded in Niagara County Clerk's Office on July 6, 1925 in Liber 505 of Deeds at Page 558, said water rights being in said last-mentioned Indenture of Deed and Agreement described as follows:

"The water rights of Cataract City Milling Company and The Pettebone-Cataract Paper Company acquired by Niagara-Lockport under the conveyances from them to Niagara-Lockport (being all the water rights of said vendors) consist of the paramount right in perpetuity to take and withdraw from the Hydraulic Basin of Niagara Company, and to convey a maxi-
996 mum of two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water to and substantially across the lands hereinbefore specifically described by metes and bounds, and thence to flow the same either through the tunnel heretofore constructed by Niagara Company under said lands or otherwise as Niagara Company may reasonably require, upon the lands of Niagara Company lying between the top of the high bank of the Niagara River and the water's edge of the said Niagara River at some place or places west, but not necessarily directly west, of the said specifically described lands, and to use said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water under a head not exceeding one hundred (100) feet, as more particularly set forth in the interlocutory judgments entered in Niagara County Clerk's Office July 14, 1920, in actions in which Hydraulic Power Company of Niagara Falls, (predecessor of Niagara Company) was plaintiff, and said Cataract City Milling Company and The Pettebone-Cataract Paper Company were respectively defendants, and the contracts of January 1, 1900, referred to in said interlocutory judgments."

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997 EXHIBIT E (To Exhibit A to Application)

BUFFALO NIAGARA ELECTRIC CORPORATION
NIAGARA — HUDSON
Buffalo 3, N. Y.

September 16, 1946

The Niagara Falls Power Company
Canal Basin
Niagara Falls, New York

Gentlemen:

The undersigned, Buffalo Niagara Electric Corporation ("Buffalo Electric") hereby offers to sell, transfer, convey and release to your company ("Niagara Power") all of its right, title and interest in and to certain rights to the use of water taken from the Hydraulic Basin of Niagara Power in the City of Niagara Falls, New York, upon terms and conditions as follows:

1. The rights proposed to be sold are those rights to the use of 262.6 cubic feet seconds of water under a head of 100 feet which, together with other property, were conveyed to Niagara, Lockport and Ontario Power Company (predecessor to Buffalo Electric) by Cataract City Milling Company and by The Pettebone-Cataract Paper Company by two certain deeds, each dated April 30, 1925, and respectively recorded on May 2, 1925 in Niagara County Clerk's Office in Liber 505 of Deeds at page 318, and in Liber 505 of Deeds at page 314. Said rights proposed to be sold are more fully described in Schedule A hereto annexed and made a part hereof.

The said rights proposed to be sold are presently under lease to your Company under and subject to the terms and provisions of a certain Indenture of Deed and Agreement dated May 1, 1925, made by and between Niagara, Lockport and Ontario Power Company and your Company, and recorded in Niagara County Clerk's Office on July 6, 1925, in Liber 505 of Deeds at page 558.

2. Buffalo Electric proposes to grant, convey and release to you, free and clear of all liens and encumbrances (other than your interest under said lease), all its right, title and interest in and to the said rights to the use of water and in the water subject thereto or affected thereby, and to any and all power generated or produced by the use of such water; to the end that your Company shall be the full and complete owner of all rights to divert such water and to use the same for power purposes.

The instrument of conveyance will further provide for the mutual release of the parties from all obligations under the provisions of said Indenture of Deed and Agree-
998 ment made May 1, 1925 with respect to said 262.6 cubic feet seconds of water and electric energy produced therefrom.

3. By way of consideration for the conveyance of said water rights and the release of obligations by it to be performed, Niagara Power will pay to Buffalo Electric the sum of $728,415.48, being the "original cost" of said water rights to Niagara, Lockport and Ontario Power Company (predecessor in title and interest to Buffalo Electric), which sum shall be paid at the closing hereunder by bank check or checks of your Company to the order of Buffalo Niagara Electric Corporation, or to such other payee as it, by written order signed by its Treasurer, may direct.

4. Concurrently with the delivery of the instrument of conveyance, Buffalo Electric and Niagara Power will make and deliver an agreement supplemental to the Agreement between Niagara Power and Niagara, Lockport and Ontario Power Company (Buffalo Niagara Electric Corporation, successor corporation), dated January 2, 1922, as amended or supplemented by instruments dated January 2, 1924, October 22, 1937 and June 14, 1946, providing that the amount of "firm energy" to be supplied by Niagara Power and paid for by Buffalo Electric under said Agreement of January 2, 1922, as amended or supplemented,

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shall be increased by the amount of 2000 kilowatts (so that the total amount of "firm energy" to be supplied and paid for under said Agreement of January 2, 1922, as amended or supplemented, shall be 32,000 kilowatts), such additional 2000 kilowatts of "firm energy" to be paid for at the rate specified in said Agreement of January 2, 1922, as amended or supplemented, namely, $26.80 per kilowatt per annum.

5. The proposed transaction will be subject to any and all requisite consents, authorizations, or approvals of regulatory authorities having jurisdiction thereof; and it is agreed that Buffalo Electric and Niagara Power will join in a petition to the Public Service Commission of the State of New York under Section 70 of the New York Public Service Law and in a declaration to the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Niagara Power will further make application to the Federal Power Commission for amendment of its License, Project No. 16, to include the water rights, when transferred to it, within its Project No. 16. In the event of failure to obtain any of such requisite consents, authorizations, or approvals (including authorization of amendment of the License, Project No. 16), or in the event that any of such consents, authorizations, approvals, or amendments be granted upon terms or conditions reasonably deemed by either Buffalo Electric or Niagara Power to be unduly burdensome, then, upon written notice by such party to the other of such determination, this agreement shall be void and of no effect.

6. The closing of the proposed transaction will be held at Electric Building, Buffalo, New York, at such date, subsequent to the making of orders of the Public Service Commission, Securities and Exchange Commission, and Federal Power Commission acceptable to the parties hereto, as either party may designate on three (3) days' written notice to the other.

999

All rights under this agreement, if the contemplated transaction be not theretofore consummated, shall

terminate and expire at 3 P.M. on December 31, 1946, unless extended by mutual agreement of the parties.

If the foregoing provisions are acceptable to you kindly indicate your acceptance thereof and agreement thereto by signing the acceptance paragraph at the foot of the duplicate counterpart of this letter herewith enclosed, and deliver the same to the undersigned.

Very truly yours

BUFFALO NIAGARA ELECTRIC CORPORATION,
By A. T. O'NEILL,
President.

The Niagara Falls Power Company hereby accepts the foregoing offer, and agrees to purchase and make payment for the rights and interests therein offered to be conveyed and to perform all other terms and conditions on its part to be performed, in accordance with the terms thereof.

Dated: September 16, 1946.

THE NIAGARA FALLS POWER COMPANY,
By W. KELLY,
Vice President.

1000 EXHIBIT F (To Exhibit A to Application)

March 11, 1925

FROM W. J. Fitzpatrick
Chief, Accounting Division

TO The Commission

SUBJECT Case No. 2427

The Petition of Niagara, Lockport and Ontario Power Company, under section 69 Public Service Commission Law, for authority to issue $725,000 in its 7% cumulative preferred capital stock ($100 shares) and under section 70 Public Service Commission Law for consent to lease to Niagara Falls Power Company certain part of petitioner's works and system and to transfer to Niagara Falls Power

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Company other parts, to be acquired through the issuance of said capital stock.

The Niagara, Lockport and Ontario Power Company filed a petition on February 25, 1925 asking authority to issue $725,000 in its 7% cumulative preferred capital stock and to deliver said stock in full payment to the Pettebone-Cataract Paper Company and the Cataract City Milling Company for lands, water rights, buildings, plants, machinery and equipment described in petition, free and clear of all liens and encumbrances, excepting only the lien of the judgments held by the Niagara Falls Power Company aggregating with interest about $172,000, which lien of judgments is to be assumed by the Niagara, Lockport and Ontario Power Company. Said lien of judgments is to be discharged by the Niagara Falls Power Company in connection with certain leases to be entered between said Niagara Falls Power Company and Niagara, Lockport and Ontario Power Company.

The petition also asks for consent under section 70 of the Public Service Commission Law to lease to Ni-
1001 agara Falls Power Company that part of the works and system of the Niagara, Lockport and Ontario Power Company which consists of 262.6 cubic second feet of water, said lease to be for the period of the Federal license of the Niagara Falls Power Company (which license expires March 1, 1971) and any renewal of said license. The rent to be paid by Niagara Falls Power Company to the Niagara, Lockport and Ontario Power Company for this lease is that said Power Company will deliver to the Niagara, Lockport and Ontario Power Company at the Power Company's Echota Substation 2000 kilowatts of alternating current of electricity subject to certain rental charges as will be shown hereafter in this memorandum under the heading of report by Engineering Division.

The petition also asks for consent under section 70 of the Public Service Commission Law to the transfer to Niagara Falls Power Company of the property to be acquired

from the Pettebone-Cataract Paper Company and the Cataract City Milling Company. The petition and supporting papers were referred to the Commission's Engineering Division and that Division under date of March 10, 1925 rendered the following report:

"I have examined the petition of the Niagara, Lockport and Ontario Power Company in respect to the Pettebone-Cataract Paper Company and Cataract City Milling Company properties in Niagara Falls. The Niagara, Lockport & Ontario Power Company asks authority to acquire the Pettebone-Cataract Paper properties and to pay therefor 7250 shares of its 7% stock, and to convey all of the property thus secured, except the water rights, to the Niagara Falls Power Company, by means of which discharge of judgments now in effect in favor of the Niagara Falls Power Co. and against the Pettebone-Cataract properties will be secured. The petitioner also asks approval of the contract which it proposes to make with the Niagara Falls Power Co. whereby it grants the use of the water rights to the latter company.

1002 The water rights in question consists of an average of 262.6 second feet of water at 100 ft. head. This will generate 2390 HP or 1800 KW. The contract above referred to provides that the Niagara Falls Power Co. will in consideration of the permission to use this water in its plant deliver to the Niagara, Lockport & Ont. Pr. Co. at its Echota substation 2000 KW for which the petitioner will pay to the Power Co. $6.70 per KW per annum for the first 15 years of the life of the contract. Analyzing this matter, it resolves itself in the following.

In accordance with the petition, the payments to be made by the Niagara, Lockport and Ontario Power Company will be——

Annual charge	$ 2,400
Annual interest on 7250 shares	50,750
Payment for energy delivered at Echota	13,400
Total	$66,550

The Niagara Falls Power Company will receive——

Payment for energy delivered by it	$13,400

plus the Pettebone properties which it will acquire.

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The Pettebone interests will receive $53,150 annually.

If the Niagara Falls Power Company were to have the use of this water through its plant and could sell the energy thus produced at the prevailing rate, namely $25. per HP, assuming that it could sell all that it might generate, it would receive therefor $59,750. If the Niagara, Lockport & Ontario Pr. Co. could sell all of the energy which it will receive under this contract at the prevailing rate, operating revenue per annum would be $66,666. In addition the Company has the water rights still in its possession.

I see no objection whatsoever to this proposition. Both companies are benefited thereby, and the Niagara Falls Co. secures control of the entire water available under the treaty. This water may then be used to the best advantage under the most advantageous methods. While the Pettebone-Cataract interests had the use of this water, it had a 100 ft. head only; the Niagara Falls interests will have the use of a head of approximately 210 ft., which will greatly increase the output. Thus it will be seen that the Niagara Falls Company will be materially benefited in increasing the production of its plant, and gives to the Niagara, Lockport and Ontario Pr. Co. only that which the latter could
1003 generate at substantially the cost of producing that amount of energy in the Niagara Falls Company's plant."

Based upon the foregoing, an order has been drawn and is herewith submitted to the Commission for its consideration wherein the Niagara, Lockport and Ontario Power Company is authorized to issue $725,000. face amount of its 7% cumulative preferred stock and to deliver same in full payment to the Pettebone-Cataract Paper Company and Cataract City Milling Company for lands, water rights, buildings, plant, machinery and equipment described in petition, free and clear of all liens and encumbrances, excepting only the lien of the judgments held by the Niagara Falls Power Company aggregating with interest approximately $172,000. The order also consents to the leasing to the Niagara Falls Power Company of all that part of

the Niagara, Lockport and Ontario Power Company's works and system consisting of 262.6 cubic second feet of water and also consents to the transfer to the Niagara Falls Power Company of all of the property to be acquired by the Niagara, Lockport and Ontario Power Company, from the Pettebone-Cataract Paper Company and the Cataract City Milling Company other than the water rights.

In connection with the petition in this case, the Niagara, Lockport & Ontario Power Company requests that the order of the Commission entered on January 28, 1925 in Case 1235 be modified in such way so as to cancel the authority to issue $725,000 par amount of 7% cumulative preferred stock out of a total issuance of $912,900 par amount of said stock therein authorized, and to authorize the issu-
1004 ance of $725,000 par amount of 7% cumulative preferred stock in the present proceeding to be delivered in payment of the property to be acquired from the Pettebone-Cataract Paper Company and Cataract City Milling Company. An accompanying order has been drawn in Case 1235 which in effect reduces the amount of stock authorized by order of the Commission entered on January 28, 1925 from $912,900 to $187,900.

Respectfully submitted,

(Signed) WALTER J. FITZPATRICK,
Chief, Accounting Division.

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1005 EXHIBIT G (To Exhibit A to Application)

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission, held in the City of Albany, on the 12th day of March, 1925.

PRESENT: William A. Prendergast, Chairman; William R. Pooley, Oliver C. Semple, George R. Van Namee, *Commissioners.*

Case No. 2427

In the matter of the petition of Niagara, Lockport and Ontario Power Company, under section 69 Public Service Commission Law, for authority to issue $725,000 in its 7% cumulative preferred capital stock ($100 shares) and under section 70 Public Service Commission Law for consent to lease to Niagara Falls Power Company certain part of petitioner's works and system and to transfer to Niagara Falls Power Company other parts, to be acquired through the issuance of said capital stock.

Petition filed February 25, 1925

Report of Engineering Division dated March 10, 1925.

Memorandum of Accounting Division dated March 11, 1925

Now, therefore, upon the foregoing record,

ORDERED AS FOLLOWS:

1. That the Niagara, Lockport and Ontario Power Company is hereby authorized to issue $725,000 par value of its 7% cumulative preferred capital stock and to deliver same to Pettebone-Cataract Paper Company and Cataract City Milling Company in full payment of certain lands, water rights, buildings, plant, machinery and equipment,
1006 owned by them in the City of Niagara Falls and more particularly described in the petition, free and clear of all liens and encumbrances, excepting only the lien of certain judgments held by the Niagara Falls Power Company against said Pettebone-Cataract Paper Company

and Cataract City Milling Company aggregating with interest approximately $172,000, which judgments the Niagara, Lockport and Ontario Power Company is to assume and procure to be discharged.

2. That this Commission, under section 70 of the Public Service Commission Law, consents to the leasing to the Niagara Falls Power Company all that part of the Niagara, Lockport and Ontario Power Company's works and system (herein authorized to be acquired), consisting of 262.6 cubic second feet of water; this lease to be for the period of the Federal License of the Niagara Falls Power Company (which license expires March 1, 1971) and any renewals of said license.

3. That this Commission, under section 70 of the Public Service Commission Law, consents to the transfer to the Niagara Falls Power Company of all the property herein authorized to be acquired by the Niagara, Lockport and Ontario Power Company from the Pettebone-Cataract Paper Company and Cataract City Milling Company, other than the water rights, such transfer to be subject to the restrictions, reservations and conditions set forth in the petition herein.

4. That the Niagara, Lockport and Ontario Power Company shall for each six months period ending June 30 and December 31 file not more than thirty days from the end of such period a verified report which shall show:

(a) What stock has been delivered during such period.

1007 (b) The dates of such deliveries

(c) To whom such stock was delivered

(d) Any other terms and conditions of such transactions

Such reports shall continue to be filed until all of said stock shall have been delivered in accordance with the

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authority contained herein and if during any period no stock was delivered the report shall set forth such fact.

5. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days of the service hereof the Company shall advise the Commission whether or not it accepts the same with all its terms and conditions, and such order shall be of no force or effect until such acceptance has been filed.

FINALLY IT IS DETERMINED AND STATED, That in the opinion of the Commission the issuance of the stock herein authorized is reasonably required for the purposes specified in this order and that such purpose is not in whole or in part reasonably chargeable to Operating Expenses or to Income.

By the Commission,

(Signed) FRANCIS E. ROBERTS,
Secretary.

(SEAL)

1008 STATE OF NEW YORK
PUBLIC SERVICE COMMISSION } ss:

I have compared the preceding copy with the original order of this Commission dated March 12, 1925, in the matter of the petition of Niagara, Lockport and Ontario Power Company, under section 69 Public Service Commission Law, for authority to issue $725,000 in its 7% cumulative preferred capital stock ($100 shares) and under section 70 Public Service Commission Law, for consent to lease to Niagara Falls Power Company certain part of petitioner's works and system and to transfer to Niagara Falls Power Company other parts, to be acquired through the issuance of said capital stock, on file in this office, and

I do HEREBY CERTIFY the same to be a correct transcript therefrom and of the whole thereof.

WITNESS my hand and the seal of the Public Service Commission, at the City of Albany, this eighteenth day of March, one thousand nine hundred and twenty-five.

FRANCIS E. ROBERTS,
Secretary.

(SEAL)
BDR

1009 EXHIBIT H (To Exhibit A to Application)

P. S. C. #143

DEED AND AGREEMENT NIAGARA, LOCKPORT & ONTARIO POWER COMPANY AND THE NIAGARA FALLS POWER COMPANY

Dated May 1, 1925

1010 INDENTURE OF DEED AND AGREEMENT, made the first day of May, 1925, by and between NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY, a corporation of the State of New York, having its principal business office at the City of Lockport, New York, (hereinafter called NIAGARA-LOCKPORT) party of the first part, and THE NIAGARA FALLS POWER COMPANY, a corporation of the State of New York, having its principal place of business at Niagara Falls, New York; (hereinafter called NIAGARA COMPANY) party of the second part.

WHEREAS, NIAGARA-LOCKPORT has acquired by deeds dated April 30, 1925, all the lands, water rights, buildings, plant, machinery and equipment of Cataract City Milling Company and The Pettebone-Cataract Paper Company, being the premises heretofore conveyed to, and (until the conveyance thereof to NIAGARA-LOCKPORT) occupied by Cataract City Milling Company and The Pettebone-Cataract Paper Company, situate west of the Hydraulic Basin in the City of Niagara Falls, New York; and

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WHEREAS, as a part of the consideration moving from it for such deeds, NIAGARA-LOCKPORT did procure from NIAGARA COMPANY certain withdrawals of appeals, satisfactions of judgments, discontinuances of actions in suits pending by NIAGARA COMPANY against said vendors, and mutual releases between NIAGARA COMPANY and said Cataract City Milling Company and The Pettebone-Cataract Paper Company, respectively; and

WHEREAS, the parties hereto have heretofore made an agreement, to be further embodied herein, for the most advantageous disposition and use of the property so
1011 acquired from Cataract City Milling Company and The Pettebone-Cataract Paper Company;

NOW, THEREFORE, in consideration of the premises, of the mutual covenants hereinafter contained, of the payments hereinafter agreed to be made, of the satisfaction of the judgments in favor of NIAGARA COMPANY against Cataract City Milling Company and The Pettebone-Cataract Paper Company, entered in Niagara County Clerk's Office October 16, 1923, and of the sum of One Dollar ($1) by each party to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto do agree with each other as follows:

Article I: NIAGARA-LOCKPORT hereby grants and releases to NIAGARA COMPANY, its successors and assigns:

All lands, buildings, plant, machinery and equipment conveyed to NIAGARA-LOCKPORT by Cataract City Milling Company and The Pettebone-Cataract Paper Company, by deeds dated April 30, 1925, including:

ALL THAT CERTAIN PIECE OR PARCEL OF LAND, situate in the City of Niagara Falls, County of Niagara, and State of New York, embracing parts of Lot Forty-one (41) of the Mile Reserve, so-called, more particularly described as follows:

BEGINNING at a stone monument at the intersection of the produced westerly line of the Hydraulic Basin with the northerly production of the east line of Main Street as said basin and street lines are shown on a map of the Village (now City) of Niagara Falls, New York, made by Jesse P. Haines, Surveyor, in 1861, and filed in Niagara County Clerk's Office; thence northerly along said westerly
1012 line of the Hydraulic Basin four hundred eighty-seven (487) feet; thence westerly at right angles thirty (30) feet to a point in the hereby granted premises, said point being at the southeast corner of said lands conveyed to the party of the first part by The Pettebone-Cataract Paper Company and in the dividing line between lands formerly owned by said company and Cataract City Milling Company; thence northerly at right angles along the easterly boundary of said lands recently owned by the Pettebone-Cataract Paper Company, being the westerly line of a private road thirty (30) feet wide on the westerly side of and immediately adjacent to said Hydraulic Basin, one hundred twenty-five (125) feet to the northeast corner of said Paper Company's premises; thence westerly at right angles along the northerly boundary of said premises twenty (20) feet; thence southerly at right angles ten (10) feet; thence westerly at right angles again along the northerly boundary of said premises about two hundred sixty-five and eighty-two one-hundredths (265.82) feet; thence northerly at right angles ten (10) feet; thence westerly at right angles still along the northerly boundary of said premises, about thirty-five and thirty-eight one-hundredths (35.38) feet to the top of the high bank of the Niagara River; thence southerly along the top of said high bank to a line parallel to the last described northerly boundary line (being the aforesaid line about thirty-five and thirty-eight one-hundredths (35.38) feet in length) and one hundred fifty (150) feet south thereof measured at right angles thereto; thence easterly along the southerly boundary of said premises at right angles to said Hy-

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draulic Basin, about three hundred seventeen (317) feet to the west line of the aforesaid private road at the southeast corner of premises so conveyed by Cataract City Milling Company to NIAGARA-LOCKPORT; thence northerly at right angles along the west line of said private road twenty-five (25) feet to the point of beginning, containing one and sixty-four one-thousandths 1.064) acres of land, together with all buildings, plant, machinery and equipment thereon, and all right, title and interest of NIAGARA-LOCKPORT in said private roadway, and in and to the lands lying between the top of the high bank and the shore of the Niagara River adjacent to and westerly of the particularly described premises. 1013

TOGETHER with the appurtenances and all the estate and rights of NIAGARA-LOCKPORT in and to said premises.

TO HAVE AND TO HOLD the premises herein granted unto NIAGARA COMPANY, its successors and assigns forever.

This conveyance is subject to the rights of other parties to the use of a strip of land thirty (30) feet wide across said premises from north to south, reserved for railway tracks.

Reference is had for a fuller understanding of the conveyance contained in this Article to the deeds of said premises to NIAGARA-LOCKPORT and the maps attached thereto.

NIAGARA-LOCKPORT does covenant, promise and agree to and with NIAGARA COMPANY, its successors and assigns, that it has not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby, or by means whereof, the above mentioned and/or described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever. 1014

This conveyance of the above described premises from NIAGARA-LOCKPORT to NIAGARA COMPANY shall not convey the water rights acquired by NIAGARA-LOCKPORT, specifically de-

scribed and set forth in ARTICLE II hereof, and this conveyance is subject to the reservation by NIAGARA-LOCKPORT of the easements set forth in ARTICLE VI of this agreement to be exercised in either or any of the events therein specified, but the subsequent Articles of this Indenture in no manner constitute conditions of the above grant, nor shall said above grant be revoked or abrogated by any breach by NIAGARA COMPANY of the subsequent provisions hereof.

ARTICLE II: The water rights of Cataract City Milling Company and The Pettebone-Cataract Paper Company acquired by NIAGARA-LOCKPORT under the conveyances from them to NIAGARA-LOCKPORT (being all the water rights of said vendors) consist of the paramount right in perpetuity to take and withdraw from the Hydraulic Basin of NIAGARA COMPANY, and to convey a maximum of two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water to and substantially across the lands hereinbefore specifically described by metes and bounds, and thence to flow the same either through the tunnel heretofore constructed by NIAGARA COMPANY under said lands or otherwise as NIAGARA COMPANY may reasonably require, upon the lands of NIAGARA COMPANY lying between the top of the high bank of
1015 the Niagara River and the water's edge of the said Niagara River at some place or places west, but not necessarily directly west, of the said specifically described lands, and to use said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water under a head not exceeding one hundred (100) feet, as more particularly set forth in the interlocutory judgments entered in Niagara County Clerk's Office July 14, 1920, in actions in which Hydraulic Power Company of Niagara Falls, (predecessor of NIAGARA COMPANY) was plaintiff, and said Cataract City Milling Company and The Pettebone-Cataract Paper Company were respectively defendants, and the contracts of January 1, 1900, referred to in said interlocutory judgments, the said water rights so acquired by NIAGARA-LOCKPORT from Cataract City Milling Company and The Pettebone-Cataract Paper Company being subject to an annual

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charge in perpetuity (hereby assumed by NIAGARA-LOCKPORT) in respect of thirty-four and eighty one-hundredths (34.80) cubic feet seconds of said water, which charge amounts to twenty-four hundred dollars ($2400) per annum, and is payable quarterly to NIAGARA COMPANY.

ARTICLE III. Subject to the reservations hereinafter contained, NIAGARA-LOCKPORT consents that from the date hereof during the term of the license granted by the Federal Power Commission to NIAGARA COMPANY, expiring March 1, 1971, and the period of any renewal thereof, NIAGARA COMPANY may utilize the aforesaid two hundred sixty-two and six-tenths (262.6) cubic feet seconds for account of NIAGARA-LOCKPORT, in and through the works and machinery of NIAGARA COMPANY upon the following basis:

1016 (a) NIAGARA COMPANY will stand ready to deliver, and NIAGARA-LOCKPORT may take at the Echota Substation of NIAGARA COMPANY in the City of Niagara Falls, New York, as the equivalent (fixed arbitrarily and solely for the purposes of this agreement) at the generating station of NIAGARA COMPANY of the use of such two hundred sixty-two and six-tenths (262.6) cubic feet seconds under a head of one hundred (100) feet, two thousand (2,000) kilowatts alternating current of the same phase, cycle and voltage of the alternating current now delivered by NIAGARA COMPANY and taken by NIAGARA-LOCKPORT at said Echota Substation under the terms of lease, dated January 2, 1922, and supplemental agreement, dated January 2, 1924, it being understood that "variable energy" referred to in such lease and supplemental agreement shall be the electric energy supplied in excess of the thirty thousand (30,000) kilowatts "firm energy" provided for in the lease of January 2, 1922, and of the two thousand (2,000) kilowatts provided for herein, without any recourse for damages against NIAGARA COMPANY for any omission or failure on its part in respect of said two thousand (2,000) kilowatts

under this subdivision (a) except in case of willful default on the part of NIAGARA COMPANY.

(b) NIAGARA-LOCKPORT will pay NIAGARA COMPANY on the 15th day of each month, beginning June 15, 1925, and ending on the 15th day of the month following the expiry of the arrangement set forth in this ARTICLE III, a sum to cover the fair value for the preceding calendar month of the development of said water into mechanical en-
1017 ergy, the generation of electric energy therefrom, and the transmission (including line losses) of the electric energy to such Echota Substation, which value is fixed (arbitrarily and solely for the purposes of this agreement) for the fifteen-year period to end April 30, 1940, at the price of Six and 70/100 Dollars ($6.70) per kilowatt per annum, so ready for delivery and which fair value for the remainder of the term of the arrangement contained in this ARTICLE III shall be readjusted to represent the fair equivalent cost of such service (including line losses) and shall be determined substantially as follows:

Either party hereto may, not more than fourteen (14) months nor less than twelve (12) months prior to May 1, 1940, (and/or within a like period prior to May 1 of any quinquenniad thereafter) give written notice that the price then being paid for the service (including line losses) specified in this subdivision (b) of ARTICLE III will in its judgment be unfair to such party for the quinquenniad beginning May 1, 1940, (and/or any quinquenniad thereafter as the case may be), and shall state in such written notice a price which such party deems fair therefor for the period of this agreement from May 1, 1940, to May 1, 1945, (and/or any subsequent quinquenniad as the case may be). The party receiving such notice may by writing served within thirty (30) days thereafter, accept such stated proposed price for such quinquenniad, or may give notice that the stated proposed price is not satisfactory, in which latter event the price shall be fixed by arbitration in the manner hereinafter provided, viz.:

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1018 The party rejecting the stated proposed price shall as a condition of its right of rejection, and with its notice of rejection, give further written notice of its choice of one arbitrator, and the other party shall within ten (10) days thereafter give written notice of its choice of one arbitrator, and the two so selected shall choose a third. In the event of the failure of the two arbitrators first chosen to select a third within twenty (20) days after the appointment of the second arbitrator, or of the failure of prompt acceptance of such appointment by said third arbitrator, the Supreme Court of the State of New York is hereby authorized to make such appointment upon application of either party. The tribunal so constituted shall give ten (10) days' written notice of the time and place of hearing of the parties, and shall proceed without delay to hear the proofs and allegations of the parties touching the subsequent price, particularly for the next following quinquenniad, and, prior to and effective on May 1, 1940, (or May 1st of any subsequent quinquenniad as the case may be) shall make its decision and award in writing signed by said arbitrators, or a majority of them, which award shall in every case be final and conclusive and obligatory upon the parties hereto, and each party hereto agrees to abide by and comply with such decision and award, provided, however, that no price may be fixed by said arbitrators which shall be in its nature confiscatory of the property rights of NIAGARA COMPANY.

1019 Any proposal so accepted or award so made shall be in force, and monthly payment shall be made and accepted in accordance therewith, from the effective date thereof, until and unless modified by like proceedings had and taken for a subsequent quinquenniad as provided in this ARTICLE III.

If required by NIAGARA COMPANY, all of the foregoing payments shall be in gold coin of the United States of America of the standard of weight and fineness existing May 1, 1925.

ARTICLE IV: Payment of any sum for service (including line losses) under the provisions of subdivision (b) of ARTICLE III hereof shall be promptly made when due, and in case of default therein NIAGARA COMPANY may at its option sue for the same, and/or give NIAGARA-LOCKPORT notice in writing of its election and decision to terminate the arrangement contained in ARTICLE III hereof at a date to be fixed therein not less than thirty (30) days from the date of service of such written notice, but if before the date fixed in such notice NIAGARA-LOCKPORT shall pay the sum due under said ARTICLE III, with interest thereon, such notice shall be deemed to be of no effect, and shall be considered as having never been served.

In case NIAGARA COMPANY shall fail in the performance of its covenants under ARTICLE III hereof, NIAGARA-LOCKPORT may maintain an equitable action for the specific performance thereof, or may serve a written notice upon NIAGARA COMPANY requiring it to remedy such default and perform its said covenants by a date to be fixed therein not less than thirty (30) days from the service of such notice, and in case NIAGARA COMPANY shall not have remedied such default and performed its said covenants hereunder, in respect of which complaint was made, by the date specified in such notice, NIAGARA-LOCKPORT may terminate this agreement at or promptly after the date specified, by written notice of such termination. Any termination of this agreement under the provisions of this ARTICLE IV shall in no way affect the liability of either party to the other for the payment of any sums of money that may have accrued or become due and payable at the date of such termination.

ARTICLE V: NIAGARA COMPANY brings to the attention of NIAGARA-LOCKPORT the conditions of the license issued to NIAGARA COMPANY by the Federal Power Commission under date of March 2, 1921, and this written contract expresses the condition required by the terms of such license that NIAGARA-LOCKPORT shall submit to the regulations, control

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and orders of the Commission as provided in sections 19 and 20 of the Federal Water Power Act whenever NIAGARA COMPANY is, or if in the like service as NIAGARA-LOCKPORT would be, subject to such regulation, control and orders, and this contract is made with the express condition that the Federal Power Commission may either with or without the joinder of NIAGARA COMPANY enforce this contract and the orders of the said Commission by appropriate proceedings against NIAGARA-LOCKPORT as provided in sections 19, 20 and 26 of the Federal Water Power Act.

The arrangement contained in ARTICLE III hereof is made upon condition that it may be and shall be revoked by NIAGARA COMPANY, without incurring any liability in damages therefor, if the Federal Power Commission shall so direct, because of the refusal of NIAGARA-LOCKPORT
1021 to obey any order or submit to regulation by the Federal Power Commission in the cases provided in the said sections of the Federal Water Power Act.

Nothing, however, in this agreement contained shall be construed as an admission by NIAGARA-LOCKPORT of any control or authority of the Federal Power Commission or of any other governmental body or officer over its right to the use of said two hunded sixty-two and six-tenths (262.6) cubic feet seconds, or as estopping NIAGARA-LOCKPORT from claiming, at any time or place, the private character and completeness of its ownership of its water rights specified in ARTICLE II of this agreement.

ARTICLE VI: The deed of conveyance contained in ARTICLE I hereof is subject to the reservation by NIAGARA-LOCKPORT of the right to use upon the lands and premises therein described the said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water under a head of not exceeding one hundred (100) feet as specified in said contracts of January 1, 1900, for the development of mechanical energy or electric energy in either of the following events:

(a) In case the arrangement contained in ARTICLE III hereof shall have been terminated by either party under ARTICLE IV hereof, or is revoked under ARTICLE V hereof;

(b) In case of the failure of NIAGARA COMPANY for any reason to stand ready to deliver the two thousand (2,000) kilowatts of electric energy at its Echota Substation as set forth in ARTICLE III;

(c) If upon or after the expiration of the
1022 license to NIAGARA COMPANY from the Federal Power Commission, NIAGARA-LOCKPORT shall for any reason prefer to use this water in a development of its own upon the premises conveyed to NIAGARA COMPANY by ARTICLE I hereof;

(d) In any case of any attempted exercise in respect of such two thousand (2,000) kilowatts of electric energy of any control or authority by the Federal Power Commission which NIAGARA-LOCKPORT deems inconsistent with its rights in respect of said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water.

In the event of any such use by NIAGARA-LOCKPORT of said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water in any power development of its own, the structures to be erected therefor and the methods to be adopted in such utilization by NIAGARA-LOCKPORT upon the aforesaid lands and premises under its reserved rights shall be of such character as to cause the least interference to NIAGARA COMPANY in its ownership, use and control of said lands, and to enable NIAGARA COMPANY to utilize said water in power development with convenience and economy for its own purposes below the elevation of four hundred sixty-one and five-tenths (461.5) feet above mean low tide at Albany, (Hydraulic Power Company datum) which point for definiteness is hereby fixed and determined as marking the lower limit of the one hundred (100) feet head under which such water may be used by NIAGARA-LOCKPORT upon

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said premises. In case of any such exercise of its
1023 reserved right to utilize said two hundred sixty-two and six-tenths (262.6) cubic feet seconds by NIAGARA-LOCKPORT upon the lands conveyed by ARTICLE I hereof, the method and manner of such use, and the structures to be maintained, to conform with the provisions of this ARTICLE VI, shall be determined by agreement after consultation between the engineers of the respective parties, or, in case of a failure to agree after such consultation, then by arbitration pursuant to the laws of the State of New York or by summary exercise of equitable jurisdiction by the Courts of the State of New York.

ARTICLE VII: This deed and agreement and all the provisions thereof shall run to and be binding upon the successors and assigns of the respective parties.

IN WITNESS WHEREOF, The parties hereto have respectively caused this instrument to be executed by their proper officers thereunto duly authorized, and their corporate seals, attested by their respective corporate secretaries, to be hereunto affixed, all as of the day and year first above written. Executed in duplicate.

NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY,
By FRED D. COREY, *President.*

(SEAL)

Attest:
W. K. KOESTER,
Secretary.

THE NIAGARA FALLS POWER COMPANY,
By MORRIS COHN, JR., *Vice President.*

(SEAL)

Attest:
F. L. LOVELACE,
Secretary.

[Acknowledgments omitted from printing.]

1025 CITY ASSESSOR'S OFFICE
Registered July 3, 1925
Niagara Falls, N. Y.

COUNTY OF NIAGARA: SS.

Recorded on the 6th day of July A.D. 1925 at 3:55 o'clock P.M. in Liber 505 of Deeds at page 558 and examined.

FRANK H. FOGAL, *Clerk.*
M. D.

1026 EXHIBIT I (To Exhibit A to Application)

BUFFALO NIAGARA ELECTRIC CORPORATION

ACCOUNT 320 "LAND AND LAND RIGHTS—HYDRAULIC"

Acquisition of Water Rights from the Pettebone-Cataract Paper Company and the Cataract City Milling Company at Niagara Falls, N. Y. (P.S.C. Case No. 2427, Year 1925)	$725,000.00
Engineering, Superintendence and Miscellaneous Construction Expenditures	3,415.48
Total	$728,415.48

EXHIBIT B (To Application)

1027 STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case No. 12727: Petition of Buffalo Niagara Electric Corporation for consent to the transfer of certain water rights to The Niagara Falls Power Company.

Appearances: Philip Halpern, Counsel (by Laurence J. Olmsted, Assistant Counsel) for the Public Service Commission.

LeBoeuf & Lamb (by Lauman Martin), 15 Broad Street, New York City, Attorneys for Buffalo Niagara Electric Corporation and The Niagara Falls Power Company.

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Jacob Sieberman, Electric Bldg., Buffalo, N. Y., General Attorney for Buffalo Niagara Electric Corporation and The Niagara Falls Power Company.

Burritt, Commissioner:

By petition received September 18, 1946, Buffalo Niagara Electric Corporation (B.N.E.) asks our approval to the sale to its wholly owned subsidiary, The Niagara Falls Power Company (Niagara Power), of certain water rights consisting of the right to take 262.6 cubic feet per second (cfs) of water from the Hydraulic Basin of Niagara Power in the City of Niagara Falls, and to use such power under a head not exceeding 100 feet. These water rights are now leased by B.N.E. to Niagara Power and are used by the latter company in the development of hydro-electric power. If the transfer is approved there will be no change in the utilization of the water or in the operations of Niagara Power.

The consideration for the conveyance and the release from certain obligations now required to be performed by Niagara Power is to be $728,415.48. The agreement of sale also provides that the present agreement between the two companies, dated January 2, 1922, providing for the sale of firm power by Niagara Power to B.N.E. shall be amended by increasing the amount of such firm power from 30,000 KW to 32,000 KW to be paid for at the rate specified in the agreement, or $26.80 per KW per annum.

Petitioner states that consent to this sale must also be obtained from Securities & Exchange Commission
1028 and Federal Power Commission, and that petitions will be made to those Commissions asking their approval immediately upon affirmative action by this Commission. Hearings were held at Buffalo on October 18 and December 11, 1946.

Petitioner submitted in evidence a copy of resolutions adopted by the Board of Directors of B.N.E. on September 16, 1946, authorizing the officers of that corporation to un-

dertake the transaction, to sell the property and to secure the requisite approvals (Exh. 1). There was also presented a resolution adopted by the Board of Directors of Niagara Power, also dated September 16, 1946, authorizing the transaction (Exh. 2).

Before reciting the history of these water rights it should be pointed out that the Niagara Falls Power Company obtained a license from the Federal Power Commission in 1921 for the use of 20,000 cfs. The license contained a clause limiting the diversion of water from the Niagara River for a period of fifty years and contained the following clause in respect to the water rights of the Pettebone Cataract Paper Company and the Cataract City Milling Company of Niagara Falls:

> "Such taking over of the project shall also be subject to the rights, if any, of Pettebone Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cfs from Hydraulic Canal or Basin of licensee, and to the rights, if any, of International Paper Company."

B.N.E. became the owner of 262.6 cfs of water rights through consolidation of Niagara Lockport & Ontario Power Company (NL&O) in November 1945. The history of these water rights is set forth in the petition of the Company and documentary exhibits and may be briefly summarized as follows:

Prior to the commencement of operation by the Niagara Falls Hydraulic Power and Manufacturing Company (predecessor to Niagara Power) in 1879, one Chesbrough had acquired certain mill sites adjacent to the Hydraulic Canal in Niagara Falls, together with rights to divert specified amounts of water from the Hydraulic Canal and to use the same for the generation of power. These mill sites and water rights were thereafter acquired by Pettebone
1029 Cataract Paper Company and Cataract City Milling Company, and the 262.6 cfs of water at 100 ft. head was utilized by these corporations for many years prior

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to 1925. In 1923 after litigation in the Supreme Court of the State of New York between the Niagara Falls Power Company as plaintiff, and the paper and milling companies as defendants, involving title to and the use of these water rights, the Niagara Falls Power Company recovered judgment against the defendants in an amount of approximately $172,000. Thereafter, in 1925, NL&O accepted from the Pettebone Cataract Paper Company and the Cataract City Milling Company the sale to it of the lands, water rights, buildings, plant, machinery and equipment owned by them at the Hydraulic Basin at Niagara Falls, including the 262.6 cfs of water rights. The payment therefor was to be $700,000 of 7 per cent preferred stock of NL&O and the assumption of or procuring the discharge of the above judgments. The offer was accepted. Thereafter Niagara Power purchased from NL&O the lands, buildings, plant, machinery and equipment, the consideration being the satisfaction of the judgments. Niagara Power also leased from NL&O the water rights, the consideration being the supplying by Niagara Power of 2000 KW of alternating current electric energy as the equivalent of this water upon the payment by NL&O of a charge initially fixed at $6.70 per KW per annum to cover costs of generation and transmission.

On March 12, 1925 in Case 2427 the Commission authorized the issue and delivery by NL&O of $725,000 par value of its 7 per cent cumulative preferred capital stock to the Pettebone Cataract Paper Company and the Cataract City Milling Company in full payment for the above and subject only to the lien on Niagara Power's judgment of $172,000. The Commission also consented to the leasing of 262.6 cfs of water to Niagara Power for the period of its federal license expiring March 1, 1971 and any renewals thereof; and further consented to the transfer by NL&O to Niagara Power of all the property authorized to be acquired from Pettebone Cataract Paper and Cataract City Milling companies other than the water rights (Exhs. F and G attached

to the petition), leaving the net face amount of the
1030 preferred stocks as the cost to NL&O of the water rights (S. M. 47).

The difference between the $700,000 which NL&O was to pay the selling companies for the water rights and the $725,000 of stock actually issued, is apparently explained by the issuance of 250 shares of stock to S. Wallace Dempsey for services in connection with the transaction. Such issuance of stock was not authorized by the Commission's order of March 12, 1925 but was reported by the Company to the Commission on July 27, 1925 (See papers in Case 2427). Of the 7,250 shares issued Pettebone Cataract Paper Company received 5,084 shares and Cataract City Milling Company received 1916 shares, and S. Wallace Dempsey received the remaining 250 shares. All these shares were redeemed by the company on January 3, 1928.

NL&O accepted the order and pursuant to the authority granted, issued $725,000 par value preferred stock and transferred all the properties acquired except the water rights to Niagara Power. These transactions were covered in a deed and agreement dated May 1, 1925 which was filed with the Commission as P. S. C. Contract No. 143 (Exh. H). Under the terms of the lease of the water rights Niagara Power has since 1925 utilized the waters which are the subject of the water rights in its plant in the city of Niagara Falls for the generation of hydraulic power under a head of approximately 215 feet, i.e. 100 feet under the purchase contract and an additional 115 feet which is already owned. Niagara Power proposes the use of this water after the consummation of the proposed transfer of BNE's right therein without change in the manner of utilization.

Niagara Power has only a license to use the water now, and this license expires in 1971. However, Mr. Hine was of the opinion (S. M. 45) that should the Federal government take over the property at the expiration of the license the Company would be entitled to be paid for the water rights; in other words, that they "are in perpetuity."

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1031 On questioning by counsel for the Commission as to possible identity of officers of the two Pettebone and Cataract Paper companies and Niagara Lockport and Ontario Power Company, the company produced Exhibit 7, which shows that as of the nearest date obtainable at the time of the transaction, namely, August 6, 1926, none of the officers of the Pettebone and Cataract companies were officers of, or connected with, the Niagara Lockport and Ontario Power Company or the Niagara Falls Power Company, either in 1925 or 1926. As far as the Commission's staff has been able to ascertain, there was no identity of interest between the Pettebone and Cataract companies and the Niagara Lockport and Ontario Power Company at the time of the transaction.

The obligation of Niagara Power to supply 2,000 KW of electric power to BNE, and the obligation of BNE to pay $6.70 per KW per annum as generating and transmission costs thereof, will be terminated if the proposed sale of the water rights is approved; and the petitioner companies propose to enter into a written contract supplementing the agreement between Niagara Power and NL&O (BNE's predecessor), dated January 7, 1922, as amended and supplemented. The new supplemental agreement will provide for the supply by Niagara Power to BNE of 2,000 KW of additional firm energy at a rate of $26.80 per KW per year under an existing contract.

The water rights which are the subject of this proceeding are described in the deed and agreement (Exhibit D attached to petition), as follows:

> "The water rights of Cataract City Milling Company and The Pettebone-Cataract Paper Company acquired by Niagara-Lockport under the conveyances from them to Niagara-Lockport (being all the water rights of said vendors) consist of the paramount right in perpetuity to take and withdraw from the Hydraulic Basin of Niagara Company, and to convey a maximum of two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water to and substantially across the lands

hereinbefore specifically described by metes and bounds, and thence to flow the same either through the tunnel heretofore constructed by Niagara Company under said lands or otherwise as Niagara Company may reasonably require, upon the lands of Niagara Company lying between the top of the high bank of the Niagara River and the water's edge of the said Niagara River at some place or places west, but not necessarily di-
1032 rectly west, of the said specifically described lands, and to use said two hundred sixty-two and six-tenths (262.6) cubic feet seconds of water under a head not exceeding one hundred (100) feet, as more particularly set forth in the interlocutory judgments entered in Niagara County Clerk's Office July 14, 1920, in actions in which Hydraulic Power Company of Niagara Falls, (predecessor of Niagara Company) was plaintiff, and said Cataract City Milling Company and The Pettebone-Cataract Paper Company were respectively defendants, and the contracts of January 1, 1900, referred to in said interlocutory judgments."

Cost of Water Rights

The original cost of these water rights, as recorded on the books of BNE in Account 320—Land and Land Rights "Hydraulic", is as follows:

Acquisition of water rights from Pettebone Cataract Paper Company and Cataract City Milling Co. at Niagara Falls, N. Y., (PSC Cs. 2427, year 1925)	$725,000.00
Engineering, superintendence and miscellaneous construction expenditures	3,415.48
Total	$728,415.48

Arthur W. Jackson, Vice President and Treasurer of BNE testified (SM 9-10) that the above amount is set up in the plant accounts of the company and included as a part of electric plant in service of $153,083,152.80 in the balance sheet of September 30, 1946 (Exh. 5). Mr. Willard F. Hine, Consulting Valuation Engineer for the Commission, who examined the accounts of NL&O in Case 10,074, testified

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that he "found nothing to question with respect to that cost", and he raised no question in that proceeding as to the amount of original cost (SM 50). He stated (SM 48) that the Pettebone Catract Paper Company and Cataract City Milling Company had not devoted the 262.6 cfs of water to the public service and that NL&O was the first to devote it to the public use. He testified (SM 48) that the overheads were those recorded on the books in the ordinary course of business at the time they were incurred, and were reasonable and proper.

1033 The effect of this transaction on the books of the two affiliates will be to transfer the cost of the 262.6 cfs of water rights at book cost, which is also said to be original cost, from the books of BNE which now owns them, to the books of Niagara Falls Power Company which now leases them. The electric plant of BNE will be reduced and that of Niagara Power increased by $728,415.48. Niagara Power's cash will be reduced and BNE's cash increased by the same amount.

Niagara Power's balance sheet at September 30, 1946 (Exhibit 6) showed cash of $3,791,943.24, or an amount which, according to the Witness Jackson, is sufficient to meet all requirements and replacements (SM 15). BNE's balance sheet (Exhibit 5) shows cash of $5,278,912.59. The witness Jackson further testified (SM 16) that the cash added to BNE's cash balance would materially assist that company in carrying out the extension program which provides for the construction of a new unit at the Huntley Station costing approximately $9,000,000, and to this extent would avoid the issuance of additional securities.

Comparative Cost of Power

As part of the rental agreement between BNE and Niagara Power for the 262.6 cfs, Niagara Power is required to furnish BNE with 2,000 KW of power for which BNE is presently obligated to pay Niagara Power $6.70 per KW per annum for generating and transmission costs. BNE is

also obligated to pay to Niagara Power an annual charge of $2,400 for 34.8 cfs, which is a part of the 260 cfs and which is described as "optional water for 12 additional run of stone" (Exhibit 7). Assuming an interest rate of 3.6 per cent on preferred stock (the present rate on BNE preferred), the annual cost to BNE of the 2,000 KW of power now received from Niagara Power as rental for the 262.6 cfs is as follows:

$725,000 preferred stock @ 3.6%	$26,100
2,000 KW @ $6.70 per KW	13,400
Annual charge for 34.8 cfs	2,400
	$41,900

1034 Under the new supplemental agreement into which the parties propose to enter if the proposed sale is approved, 2,000 KW of firm energy will be added to the existing contract for 30,000 KW of firm energy which BNE now purchases from Niagara Power at the contract rate of $26.80 per KW per year under the Contract 267 (old style), or a total of $53,600. On this basis the same amount of power will cost BNE $11,700 more than at present.

Mr. Hine testified (SM 42) that he had made an examination of the worth or value of the water rights proposed to be sold and of the propriety of the proposed payment therefor. He found that BNE pays Niagara Power $15,800 per year for the power received under the rental arangement and that under the new arrangement after the sale, BNE will pay Niagara Power $53,600 for an equivalent amount of power as shown above; in other words when BNE ceases to own the 262.6 cfs, it will pay an additional $37,800 per year for the equivalent of the power it now receives. This, Mr. Hine pointed out, is 5.2 per cent on the proposed sale price of $728,415.48.

Asked as to how the value of the 262.6 cfs of water diverted could be related to a dollar figure price, Mr. Hine referred (SM 44) to what Niagara Power received under its regular filed schedule for power, and stated that on a capi-

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talized basis and making no allowances for expenses in connection with generation or for return, practically the same amount of value to the present owner would be indicated.

No franchise or consent for the distribution of electric energy is involved in the transfer and there are no contributions for construction.

1035 SUMMARY AND CONCLUSION

Niagara Power is a wholly owned subsidiary of BNE. The 262.6 cfs of water rights are now owned by BNE and leased to Niagara Power. By agreement between these two affiliated companies, it is proposed that the parent sell the water rights to the child. The price of the water rights of $728,415.48 was apparently originally fixed by arms length bargaining between two non-affiliated parties. Acquisition of these rights by NL&O (predecessor company) was consented to by this Commission by order of March 12, 1925 in Case 2427, which order also authorized the issuance of $725,000 of preferred stock by NL&O in payment therefor. The amount was not questioned as original cost in Case 10,074 (Continuing Property Records proceeding) and the water rights were transferred to the present owner at that figure (Case 11,748—the consolidation proceeding).

The book cost which equates to approximately $2,770 per cfs for only 100 feet of fall seems excessive. At this rate 20,000 cfs would have cost $55,400,000 for less than half the fall realized by Niagara Power. In the proceeding in which NL&O (predecessor company) was authorized to acquire the water rights at $725,000 and to issue the preferred stock, there is absolutely nothing to show the original cost of the water rights to the owners. There appears to be no way of determining such cost other than by what NL&O was permitted to pay for them.

In authorizing the transfer of these water rights between affiliates, at the amount of $728,415.48, it should be made clear that this decision must not be taken as a determination of the value of the property transferred.

It seems desirable that the Company which uses the water rights should own them rather than lease them from its parent. As a practical operating matter there will be no change and the public will not be affected thereby. On this basis, it is in the public interest to authorize the transfer.

An order is submitted accordingly.

Jan. 27, 1947

M. C. BURRITT, *Commissioner.*

APPROVED BY THE COMMISSION FEB. 5, 1947.

1036 EXHIBIT C (To Application)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on February 5, 1947

COMMISSIONERS PRESENT:

Milo R. Maltbie, Chairman
Neal Brewster
Maurice C. Burritt
George A. Arkwright
Spencer B. Eddy

CASE 12727—Petition of Buffalo Niagara Electric Corporation for consent to the transfer of certain water rights to The Niagara Falls Power Company, which corporation joins in this petition.

A petition verified September 16, 1946, having been filed with this Commission by Buffalo Niagara Electric Corporation for consent to transfer a part of its works and system described in the petition herein to The Niagara Falls Power Company, which latter corporation joins in the petition, consisting of certain water rights to take 262.6 cubic feet per seconds of water from the Hydraulic Basin of The Niagara Falls Power Company in the City of Niagara Falls,

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New York, and to use such water under a head not exceeding 100 feet, and public hearings after due notice having been held, and the Commission having determined that said transfer is in the public interest, it is

ORDERED:

1. That the consent of this Commission be and it hereby is granted to Buffalo Niagara Electric Corporation to transfer to The Niagara Falls Power Company the part of its works and system located in the City of Niagara Falls, New York being more particularly described in paragraph "6" of said petition and in Exhibit "D" attached thereto, the total consideration to be paid not to exceed $728,415.48, and said consideration to include all costs and expenses incidental to the transfer of the property herein authorized which have been paid or to be paid by said transferee to said transferor or on its behalf.

2. That the said property when transferred shall be free and clear of all liens and encumbrances.

1037 3. That the consent herein granted is not, nor shall it be construed as a determination by this Commission as to the value of the property herein authorized to be transferred.

4. That upon the transfer herein authorized, the same shall be reflected in the books and records of Buffalo Niagara Electric Corporation and The Niagara Falls Power Company by the following journal entries, herein directed to be made:

By Buffalo Niagara Electric Corporation:

126. Receivables from Associated Companies, Dr. $728,415.48
The Niagara Falls Power Company

to

101. Electric Plant in Service, Cr. $728,415.48
320. Land and Land Rights, $728,415.48

To record the sale to The Niagara Falls Power Company of certain water rights along the Hydraulic Canal. (P.S.C. Case 12727.)

By the Niagara Falls Power Company:

101. Electric Plant in Service, Dr. $728,415.48
320. Land and Land Rights $728,415.48

to

223. Payables to Associated Companies, Cr. $728.415.48
Buffalo Niagara Electric Corporation

To record the acquisition of certain water rights along the Hydraulic Canal. (P.S.C. Case 12727.)

5. That if the transfer herein authorized is not carried out within twenty days of the date of this order, this order shall be null and void.

6. That this order shall be without force or effect until there have been filed with this Commission unconditional acceptances by Buffalo Niagara Electric Corporation and The Niagara Falls Power Company agreeing to obey all of the terms, conditions and requirements of this order and that if such acceptances are not so filed within a period of twenty days from the date of service of this order, this order shall be null and void.

By the Commission,

(Signed) MURRAY G. TANNER,
Secretary.

(SEAL)
LJO:dbr
SCW LM

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1038 EXHIBIT D (To Application)

BUFFALO NIAGARA ELECTRIC CORPORATION
NIAGARA — HUDSON

Buffalo 3, N. Y.

December 31, 1946

The Niagara Falls Power Company
Canal Basin
Niagara Falls, New York

Gentlemen:

The letter agreement between us, dated September 16, 1946, with respect to the proposed sale and transfer of certain rights, title and interest in and to rights to the use of water taken from the Hydraulic Basin of your Company in the City of Niagara Falls, provides that unless extended by mutual agreement of the parties all rights thereunder shall terminate and expire on December 31, 1946.

In view of the fact that certain regulatory consents necessary to the proposed transfer are still to be secured, we suggest that the rights under the agreement of September 16, 1946 be extended to terminate and expire on April 15, 1947 unless then extended by mutual agreement of the parties.

If the foregoing is acceptable to you, kindly indicate your acceptance thereof and agreement thereto by signing the enclosed counterpart and returning the same to us.

Very truly yours,

BUFFALO NIAGARA ELECTRIC CORPORATION,
By A. T. O'NEILL,
President

Accepted:

December 31, 1946

THE NIAGARA FALLS POWER COMPANY
By ROB ROY MACLEOD
Vice President

Item B Under Stipulation, Page 253, Supra.

1039 THE NIAGARA FALLS POWER COMPANY

NIAGARA — HUDSON

Buffalo, New York

March 17, 1947

Federal Power Commission
Hurley-Wright Building
Washington 25, D. C.

Gentlemen:

Thank you for your letter of March 7, 1947 with reference to our application filed February 17, 1947 for amendment of the license for Project No. 16.

The license in its present form appears to us specifically to exclude from project property the water rights of the Pettebone-Cataract Paper Company and Cataract City Milling Company outstanding as of March 2, 1921. These rights were acquired by a predecessor of Buffalo Niagara Electric Corporation in 1925 and have since that year been used by us under lease in the generation of electric energy in the Schoellkopf Station which is a portion of the property under license in Project 16.

It is the purpose of our requested amendment of license for Project 16, and we hereby so apply, to have the license amendment include in the project the so-called Pettebone-Cataract water rights which are to be acquired from Buffalo Niagara Electric Corporation.

We propose to pay Buffalo Niagara Electric Corporation for such water rights the amount of $728,415.48. As indicated by Exhibits B and C attached to the application filed February 17, 1947, the Public Service Commission of the State of New York has approved the proposed transfer of the water rights from Buffalo Niagara Electric Corporation to us. The Public Service Commission has extended the time within which such transfer may be effected pursuant to its authorization to April 15, 1947.

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Since the filing with your Commission of the application for amendment of the license with respect to the so-called Pettebone-Cataract water rights, the Securities and Exchange Commission, by its order dated February 28, 1947 in its File No. 70-1456, has also duly approved the proposed transaction.

1040 We propose to include the payment of $728,415.48 for the Pettebone-Cataract water rights in the actual legitimate original cost of Project 16 upon acquisition of such rights.

The proposed acquisition of said water rights involves purchase of an outstanding property right presently utilized under lease by licensee. The property acquisition will be duly recorded by deed entered in the office of the County Clerk of Niagara County. The rights under consideration were part of several granted out in perpetuity by a predecessor in title to licensee.

The acquisition of water rights similar in character to the so-called Pettebone-Cataract rights has heretofore been recognized specifically by your Commission as allowable for inclusion as part of the actual legitimate original cost of Project 16. The amount of $650,000 as suspended by Exception No. 14 in the earlier determination of actual legitimate original cost of Project 16 as of March 2, 1921 covered in part purchase of rights to draw a specific amount of water from the Hydraulic Canal. This amount was allowed as part of the actual legitimate original cost of Project 16 as of March 2, 1921. See in this connection the order of your Commission dated December 28, 1943, supplemental to the order of June 9, 1942 determining actual legitimate original cost and prescribing accounting therefor, particularly determination No. 3 in that order. We therefore believe the inclusion of the cost of the so-called Pettebone-Cataract water rights as part of the actual legitimate original cost of Project 16 is proper.

Your attention is also directed to the fact that the acquisition of these rights and the subsequent modification of

the power contract between The Niagara Falls Power Company and Buffalo Niagara Electric Corporation will result in additional revenues to licensee permitting a return to it of $37,800 a year additional, or 5.2% on the cost of the water rights, i. e., $728,415.48. The effect of the proposed transaction is discussed at some length in the opinion of the Public Service Commission attached as Exhibit B, particularly at pages 7, 8 and 9 thereof.

1041 With reference to the necessity for amendment of license, your attention is directed to statements contained in the application, in paragraph 3 thereof, which briefly summarized are that the proposed transfer of the water rights to licensee will vest in it full ownership of an outstanding water right which constitutes a right in real property and which right is presently in use in the project under lease from an affiliate.

Will you kindly acknowledge receipt of this amendment to our application filed February 17, 1947 and advise us whether or not any additional information is required by your Commission for action on the application as amended.

Very truly yours,

THE NIAGARA FALLS POWER COMPANY,
By A. T. O'Neill
Vice President.

BLEED THROUGH-

Applicant's Exhibit 1.

1168 For Immediate Release Monday, March 3, 1947

SECURITIES AND EXCHANGE COMMISSION
PHILADELPHIA

Holding Company Act of 1935
Release No. 7246

United States of America
Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 28th day of February, A. D., 1947.

ORDER PERMITTING DECLARATION TO BECOME EFFECTIVE

In the Matter of

Buffalo Niagara Electric Corporation
The Niagara Falls Power Company

File No. 70-1456
(Public Utility Holding Company Act of 1935)

Buffalo Niagara Electric Corporation ("Buffalo"), a subsidiary of Niagara Hudson Power Corporation, in turn, a subsidiary of The United Corporation, a registered holding company, and The Niagara Falls Power Company ("Niagara"), a subsidiary of Buffalo, having filed a joint declaration, pursuant to Rule U-44 promulgated under the provisions of the Public Utility Holding Company Act of 1935, regarding the sale by Buffalo to Niagara of certain water rights consisting of the right to take 262.6 cubic feet per second of water from the Hydraulic Basin of Niagara in the City of Niagara Falls. The water rights are presently owned by Buffalo and leased to Niagara which utilizes such rights exclusively for the generation of hydro-electric power.

The consideration for the conveyance and the release from certain obligations now required to be performed by Niagara is $728,415.48, an amount equivalent to the original cost of the water rights, as recorded on the books of Buffalo.

The proposed transaction having been approved by the Public Service Commission of the State of New York on February 5, 1947; and

Said declaration having been filed on February 12, 1947, and notice of filing having been duly given in the form and manner prescribed by Rule U-23 under said Act, and the Commission not having received a request for hearing with respect to said declaration within the period specified in such notice or otherwise, and not having ordered a hearing thereon; and

Declarants having requested that the Commission's order permitting the declaration to become effective be issued within fifteen days from date of filing; and

1169 It appearing to the Commission that it is appropriate in the public interest and in the interests of investors and consumers that said joint declaration be permitted to become effective immediately;

It Is Ordered, pursuant to Rule U-23 and the applicable provisions of the Act, and subject to the terms and conditions prescribed in Rule U-24, that the aforesaid declaration be, and the same hereby is, permitted to become effective forthwith.

By the Commission.

Orval L. DuBois,
(Seal) *Secretary.*

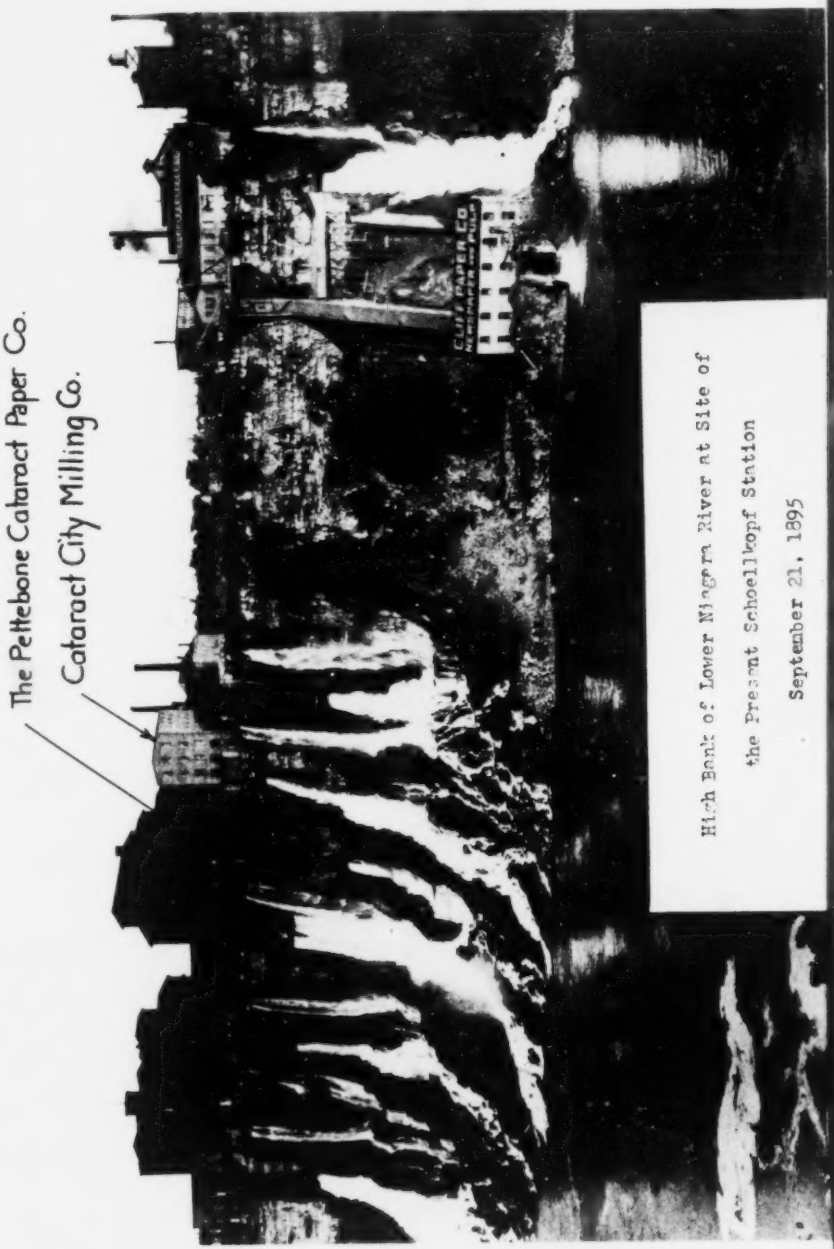
* * * * * * * * * * *

BLEED THROUGH-

Item C By Reference
Item D To Stipulation: Applicant's Exhibit 2.

Air Photograph of a Portion of the City of Niagara Falls.

Item C By Reference
Item D To Stipulation: Applicant's Exhibit 4.



Photograph of the High Bank and Milling District,
Taken in 1895.

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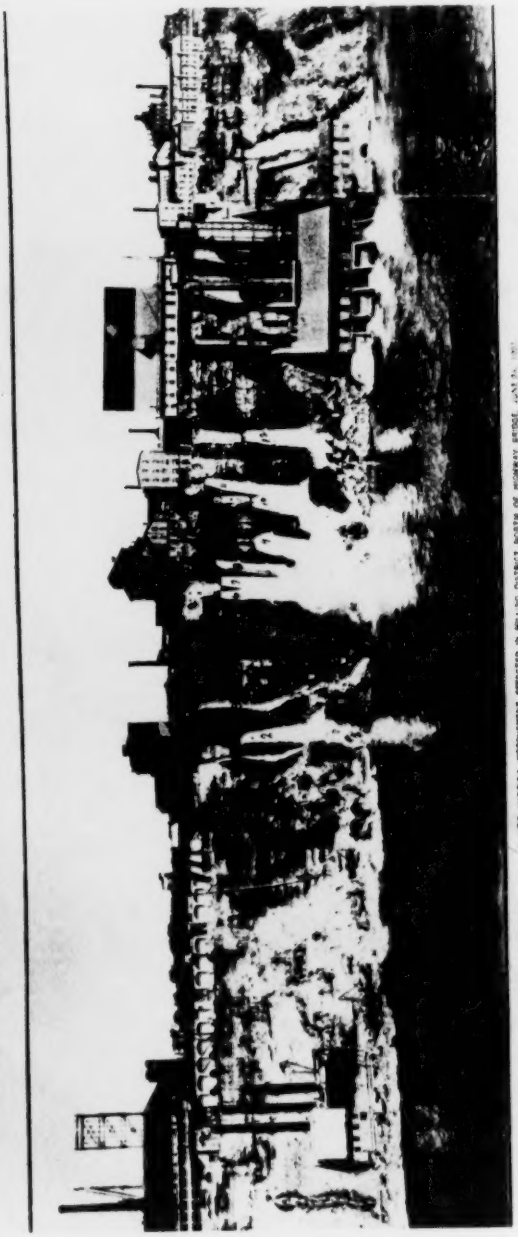
Item C By Reference
Item D To Stipulation: Applicant's Exhibit 5.

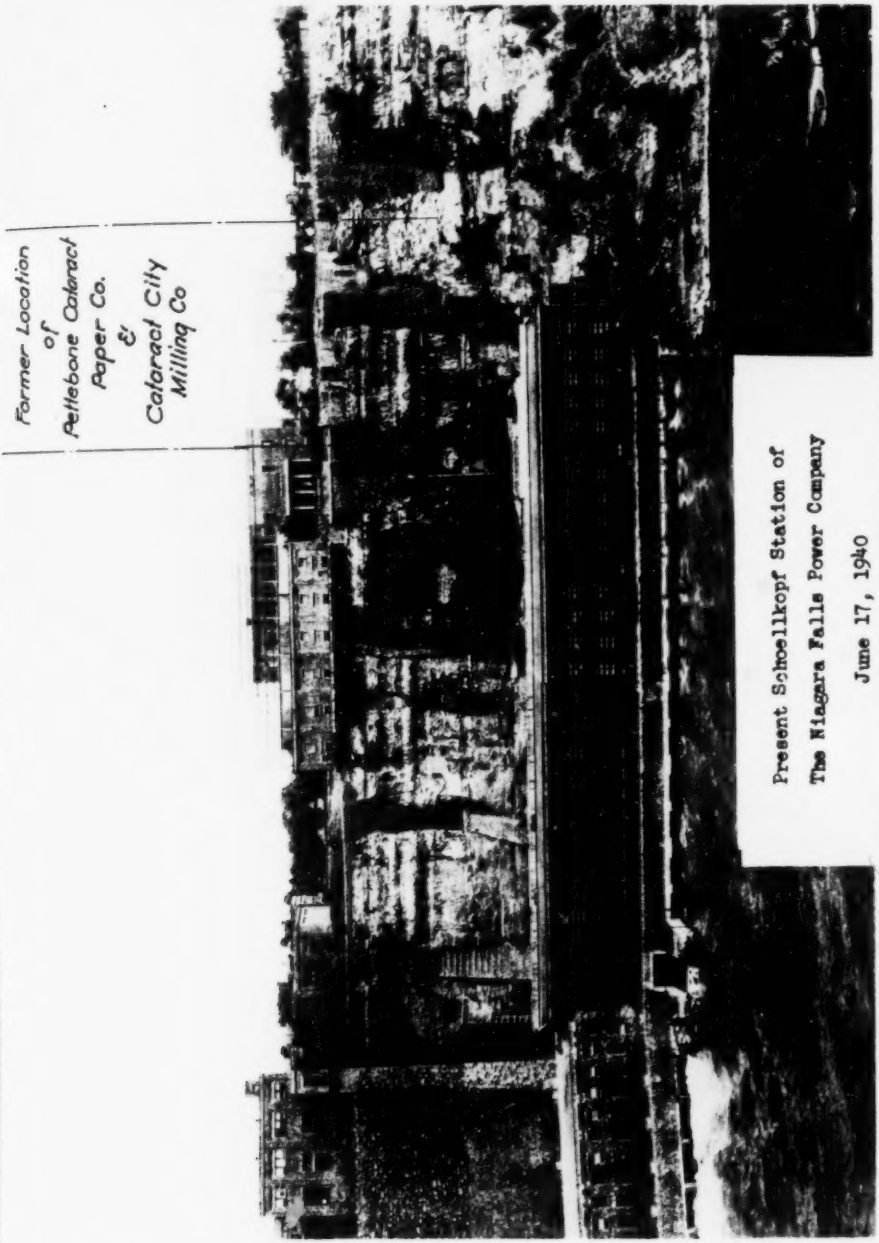


ENLARGEMENT OF PART OF PHOTOGRAPH FROM HOUSE OF REPRESENTATIVES DOCUMENT No. 426, 62ND CONGRESS, 2ND SESSION. OUTFLOWS SHOWN AS Nos. 9, 10 & 11 ARE FROM PETTEBONE-CATARACT PAPER COMPANY AND CATARACT CITY MILLING COMPANY, AS OF 1907.

Photograph of the High Bank and Milling District, Taken in 1907.

BLEED THROUGH-

Item C By Reference
Item D To Stipulation: Applicant's Exhibit 6.



Photograph of the High Bank and Schoellkopf Station Showing Conditions Existing in 1947.

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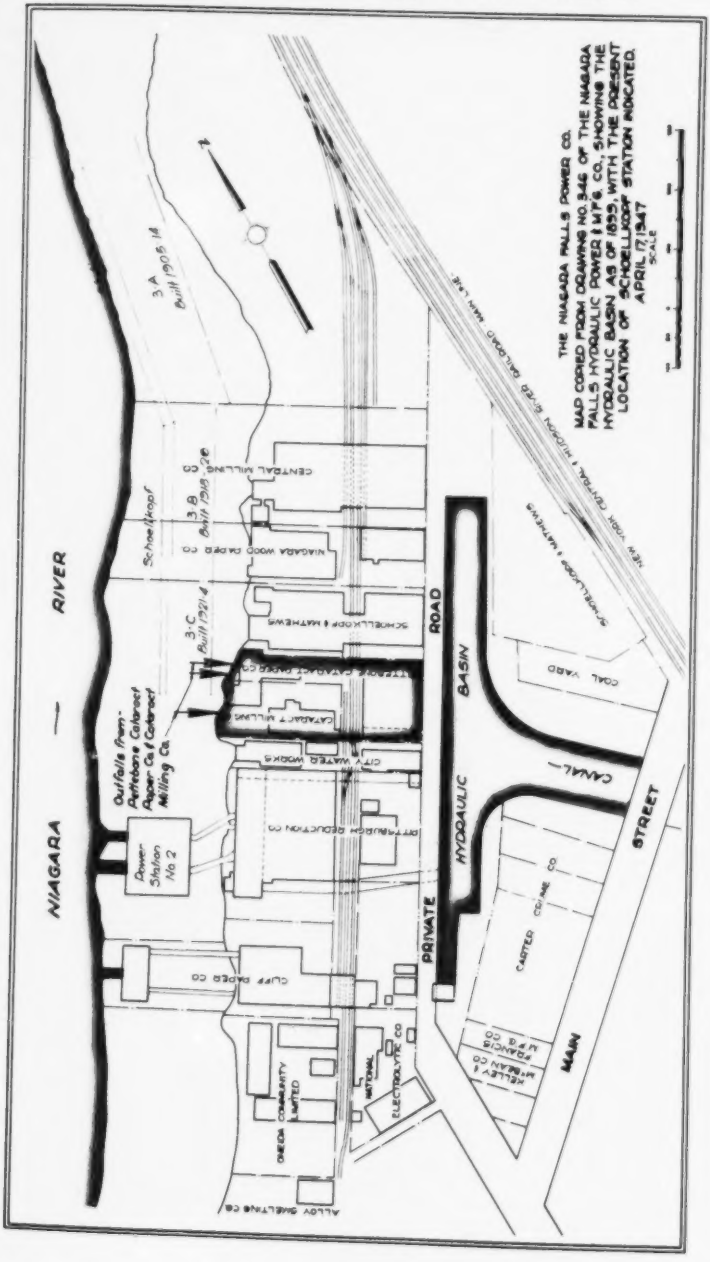
Item C By Reference
Item D To Stipulation: Applicant's Exhibit 7.



Map Showing the Hydraulic Canal Basin as of 1899.

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Applicant's Exhibit 8—Hydraulic Power Company v. Pettibone Cataract Paper Co., New York Supreme Court, Niagara Special Term, July, 1920, 112 (N. Y.) Misc. 528; 183 N. Y. Supp. 373. (Extracts.)

1176

HYDRAULIC POWER COMPANY OF NIAGARA FALLS, Plaintiff, *v.* PETTIBONE CATARACT PAPER COMPANY, Defendant.

HYDRAULIC POWER COMPANY OF NIAGARA FALLS, Plaintiff, *v.* CATARACT CITY MILLING COMPANY, Defendant.

(Supreme Court, Niagara Special Term, July, 1920.)

Injunctions—actions to restrain defendants from interfering with the construction of a tunnel for the purpose of carrying off and utilizing certain waste waters—contracts—easements—equity.

[Headnotes from Vol. 112, Miscellaneous Reports.]

The fairness of a contract is to be judged as of the time it was made. (Pp. 539, 540.)

Where a grant or right in the nature of an easement has once been exercised and located, the location and definite course so fixed cannot be changed without the acquiescence and consent of both parties. (P. 541.)

The plaintiff is the owner of a hydraulic system designed to develop hydraulic and electric power, and consists of a canal tapping the Niagara river some distance above the Falls. The water received from the river is conducted through the canal to a basin on the high bank of the river below the falls, and is dropped over the bank onto turbines which generate power. Defendants' plants are erected on land the title to which is bounded by the edge of the high bank of the river about 215 feet above the surface of the water in the river. Between the edge of the high bank and the margin of the river is a strip of land of varying width, which is owned by plaintiff. The turbines of

the defendants are located about 100 feet below the top of the high bank, and after the water has been dropped from the high bank onto the turbines it is discharged upon and flows over the plaintiff's land and into the river. For many years prior to 1900 the discharged water after leaving defendants' wheel pits flowed down and over the talus or slope of land owned by plaintiff. *Held,* that though the defendants would have had no legal right to divert the waters to other parts or to have insisted on the right to have constructed either a tunnel or canal across the
1177 the lands of the plaintiff, the contracts made in that year between the parties put an end to any such claim. (P. 541.)

A contract made in 1900 by each of the defendants with plaintiff's predecessor, whereby the parties settled and adjusted their disputes, determined anew the quantity of water each was to take and the manner and method of ascertaining the quantity, the price to be paid, etc., and provided that the party of the first part would afford to the party of the second part "every proper facility for the construction, maintenance and operation of such tunnel * * * and * * * does hereby grant unto said party of the second part the right to enter on, construct, maintain and operate in, through and across said party's premises * * * such tunnel, flume, conduit and cross tunnels and appurtenances as may be necessary or proper," etc. *Held,* that said agreement was an executed rather than an executory contract; that there was a present grant which conferred a right or easement in and through the property of the defendants rather than to give one in the future, and that the agreement was one which equity would enforce. (Pp. 543, 544.)

Where, therefore, each of the defendants in a written communication to plaintiff raising objections to its proposed plans for the construction of the tunnel, re-

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pudiated the agreement *in toto* so far as related to the tunnel, at the same time claiming for themselves all the other rights and privileges given by the agreement, the plaintiff in an action to restrain the defendants from interfering with the construction of the tunnel under the properties of the defendants for the purpose of carrying off and utilizing certain waste waters after the same had been used by the defendants for the generating of power for their respective plants, as provided by the contract of 1900, will be granted judgment for the relief demanded.

The good fortune of the plaintiff in benefiting by the advance in the value of such rights was no reason why the defendants should not abide by the agreements as made.

Actions for injunctions.

Edward E. Franchot, for plaintiffs.

Louis Marshall and William W. Storrs, for defendants.

1178 Wheeler, J. These actions involve substantially the same facts in each case, and have, therefore, been tried together. The decision in one involves the decision of the other.

These actions were brought to restrain the defendants from interfering with the construction of a tunnel under the properties of the defendants for the purpose of carrying off and utilizing certain waste waters after the same had been used by the defendants for generating power for their respective plants, as provided in certain contracts with the defendants made January 1, 1900. The contract made with each defendant is practically identical so far as they relate to the tunnel in question.

The plaintiff is the owner of a hydraulic power system designed to develop hydraulic and electric power. It consists of a canal tapping the Niagara river a distance above the falls of that name. The water received from the river

is conducted through the canal to a basin on the high bank of the river below the falls, and from this basin dropped over the bank onto turbines below, which generate power. The water taken by each of the defendants drops upon wheels which by suitable shafting are mechanically connected with their machinery in their factory or mills above. Most of the other water taken from said basin is conducted to turbines built at the edge of the river, and there converted into electrical power which is transmitted by wires and cables to the factories and plants using the power. The plants of the defendants are erected on land the title to which is bounded by the edge of the high bank of the river about 215 feet above the surface of the water in the river. Between the edge of the high bank and the margin of the river is a strip of land of somewhat varying width, which is owned by the plaintiff. The turbines or water wheels of the defendants are located about
1179 100 feet below the top of the high bank. After the water has been dropped from the high bank onto these wheels it is discharged upon and flows over the plaintiff's land until it flows into the river itself.

Prior to the making of the contracts of January, 1900, the defendants had each been taking and using certain quantities of water for power purposes from the plaintiff's predecessor in title. Controversies had arisen as to the quantity of water the parties were entitled to draw from the hydraulic basin, and the duties each owed the other under their then existing agreements. Suits had been brought and were pending against defendants growing out of alleged violations of such agreements.

That being the situation, the defendants each entered into an agreement with the Niagara Falls Hydraulic Power and Manufacturing Company (the predecessor of the plaintiff), whereby the parties settled and adjusted their disputes, determined anew the quantity of water each was to take, and the manner and method of ascertaining the

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quantity, the price to be paid, etc. These agreements further recited that whereas, "it is contemplated by the said party of the second part [*i. e.*, the power company] that it will sometime in the future construct a tunnel, flume or other conduit along or within the easterly bank of Niagara River for the purpose of collecting water discharged by the mills operating on the top of said bank, and otherwise flowing over said bank, and of accumulating such water and making use of the same, in the development of power on the lower portion of said bank" therefore "said party of the first part does hereby grant unto said party of the second part, the right to enter on and construct, maintain, and operate in, through and across its said first party's premises, located on the east-
1180 erly bank of Niagara River, in the City of Niagara Falls, N. Y., where the mills of said Cataract City Milling Company and of the Pettibone Cataract Paper Company are now located, such tunnel, flume, conduit and cross tunnels and appurtenances as may be necessary or proper for the collection, accumulation and conveyance of the water discharged from the wheels in said mills of the Pettibone Cataract Paper Company, and of other mills on said bank, and from any other wheels which may hereafter be located or operated on said bank, and of any other water passing over said bank, and for conveying the same to such point where it can be conveniently used by said second party." The agreement then goes on to specify how the work shall be done and sets forth many things which it is not necessary to set forth beyond what is subsequently given in the course of this opinion.

The Niagara Falls Hydraulic Power and Manufacturing Company subsequently became merged into the plaintiff in this action, which acquired thereby all the rights, property and franchises of its predecessor.

In 1914 the present plaintiff determined to proceed with the construction of the tunnel and flume, and took steps toward that end, and submitted for the considera-

tion of each defendant a plan of the proposed tunnel. Thereupon each defendant repudiated the right of the plaintiff to construct such tunnel, and refused to permit the plaintiff to proceed with its construction. As will more fully appear later on, the defendants and each of them declined to co-operate with the plaintiff or take any steps in relation thereto. The plaintiff thereupon, after having taken certain steps provided for in the agreements referred to, brought these actions for an injunction to restrain the defendants from in any manner interfer-

1181 ing with or preventing the construction of the tunnel as provided in said agreements.

Many objections have been raised by defendants against the relief asked. It will be impossible to dicuss them all. We can only refer to the more important.

The defendants contend at the outset that the plaintiff cannot maintain these actions as the successor by merger of the Niagara Falls Hydraulic Power and Manufacturing Company with the Hydraulic Power Company of Niagara Falls.

* * * * * * * * * *

1182 The contracts and the rights therein conferred became the property of the possessor corporation, the plaintiff in this action. Going with such rights and privileges are the corresponding obligations to be performed and kept in favor of the defendants. The rights and privileges and obligations imposed are inseparable, and when the plaintiff accepted and undertook to avail itself of the franchises, easements and privileges conferred it necessarily and by very operation of law, also assumed the counter obligations imposed. It could not enjoy the privileges without meeting the obligations.

* * * * * * * * * *

1183 For these reasons we are of the opinion that the position of the defendants that the plaintiff may not

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1184 enforce the rights given under the contract now under consideration, is not well taken.

It is urged by counsel for the defendants that the contracts in question should not be enforced on account of *laches* on the part of the plaintiff and its predecessor in title. It is true the contracts were made in 1900, and it was not decided until 1914 to proceed with the construction of the tunnel contemplated in the agreements. There is no claim that the project was ever formally abandoned by the plaintiff or its predecessor in title. The mere lapse of time cannot be deemed sufficient to defeat a right or easement clearly granted and conferred. It is manifest from the wording of the instruments in question that it was not contemplated the work of constructing a tunnel should be begun at an early date.

The agreements read: "And whereas, it is contemplated by said party of the second part, that it will *sometime in the future,* construct a tunnel * * * for the purpose of collecting the water, etc."

The instruments leave the time for constructing the tunnel purposely indefinite. Evidently it was expected that its construction should not be undertaken until the demand for power should be such as to justify the utilization of the waste waters for that purpose. The evidence is that the public demand for power created no occasion for the tunnel until about the time it was determined to proceed with the work.

We clearly are of the opinion that the plaintiff lost none of its rights under these contracts because of any delay in not building at an earlier date. We do not mean to say that delay may not operate in special cases to defeat a right conferred, where by the lapse of time the situation of the parties or properties have so changed as to make it inequitable to enforce such a right. I am un-

1185 able, however, to discover in the evidence in this case that any such changes exist, or any altered physical conditions which would make the construc-

tion of the tunnel more hazardous or burdensome to the defendants than it was at the time the contracts were made. Indeed it was practically conceded by the engineer called and sworn for the defendants, that if the work of building the tunnel is carefully and properly done, the danger to the defendants' properties would not be at all serious. Certainly no more serious than it was had the tunnel been built shortly after the agreements were made.

We think that the defense of *laches* is without merit. In nearly all cases where the defense of *laches* is available, it will, we think, be found that some element of estoppel existed which made it inequitable to enforce strict legal rights. In this connection and somewhat akin to the defense of *laches* is the general argument advanced by the defendants that other conditions have so changed that the plaintiff ought not to prevail in these actions.

It is said water power has become more valuable since the making of the contracts, and it would be unconscionable in view of such facts to now enforce the agreement for a tunnel. If the enforcement of the contracts deprived the defendants of any rights, if it lessened the amount of power they are to get, if it interfered with the enjoyment of what it is stipulated they should receive, there might be color to the argument advanced. The building of the tunnel, however, works none of these things. The defendants are deprived of no power belonging to them or agreed to be furnished. The defendants have only the use of the water as it flows for the purpose of generating power, and to a limited quantity. After it has passed their wheels and accomplished its purpose for them it is no longer the property of the defendants, but
1186 waste water flowing over and across the plaintiffs' lands to the river below. The contracts simply provide for a means of utilizing these waste waters, by permitting a tunnel to be run through and under the defendants' properties.

BLEED THROUGH-

We are unable to see how the defendants are deprived of anything, or that the advance in the value of power or power rights in any way affects the questions now under consideration. The good fortune of the plaintiff in benefiting by the advance in the value of such rights is no reason why the defendants should not abide by the agreements made.

Among other objections raised by the defendants to the relief asked is that if granted and the agreement made is carried out by the construction of the tunnel for the carrying off of the waste water after it has been used on the defendants' wheels, it will operate to deprive the defendants of a right claimed to sink their power shafts to substantially the level of the river, whereby greatly increased power can be developed by the additional fall, and that to deprive defendants of such additional power would be most inequitable and so unjust that a court of equity ought not in good conscience to enforce such provisions in the plaintiffs' favor.

The first answer to the defendants' contention is that by the agreements of January 1, 1900, said defendants each agreed that they "will not permit the discharge of water on its premises at any other points that were now discharged, unless the same be necessary to the proper conducting of its business, and in no event shall it locate its wheels or discharge any water on or over said bank at a lower level than 461.5 feet above mean low tide at Albany, and that in any event it will before making such new discharge at or above said point 461.5 feet above
1187 tide level, give to the party of the second part six months previous notice of its intention so to do, and will afford said party of the second part all proper and reasonable facilities for building proper connections to collect and convey said water from such new point of discharge to such points as second party may desire."

In other words, the defendants agreed not to substantially change the location of their wheel pits lower than

their present location below the top of the bank, which negatives by positive agreement any pretended right on their parts to sink their wheel pits to the substantial level of the river for the purpose of generating increased power by an additional fall of the water.

These terms and conditions of the contract between the parties were not deemed unreasonable or oppressive at the time they were made. The contracts in question were not hastily or inadvisedly made. It appears they were the subject of prolonged preliminary negotiations between the parties, in which the defendants were represented and advised by able and distinguished legal counsel. We are unable to discover anything in the evidence that made or makes the contracts entered into unfair or inequitable. It certainly was thought fair at the time it was made, and the principle is clearly laid down that in passing upon the question of fairness a contract is to be judged as of the time it was entered into.

* * * * * * * * * *

1188 In any event conditions have not so changed since the contracts were made as to make their enforcement more burdensome at the present time than when made. The entire argument of counsel for the defendants is based on the assumption and assertion that prior to the making of the contracts in question, they each had the right to take a given quantity of water for power purposes and the right to utilize that quantity to the greatest advantage by sinking wheel pits below the point 461.5 feet above mean low tide at Albany, at which point the wheel pits were then located.

As matter of law and as matter of fact it is exceedingly questionable whether under the prior contracts existing before the contracts of January 1, 1900, were made, said defendants had any right to lower their wheel pits for the purposes of additional power. The practical situation existing at that time and existing now was and is that

BLEED THROUGH-

the point 461.5 was the point at which the vertical cliff ended, and talus or slope at the foot thereof began. 1189 This talus or slope measures approximately 150 feet horizontal distance from cliff to water's edge. To install machinery at a point below 461.5 necessarily involved some means to discharge the waters used, and this could only be done by providing some tailrace from the turbines or wheels, which involved a tunnel under, or a canal across, the plaintiff's lands, whereas it in fact flowed over and down the surface of the slope into the river. Could the defendants under their former rights claim the right to construct and maintain across plaintiffs' lands any such tunnel or canal, in absence of any specific agreement therefor?

The authorities seem to hold that where a grant or right in the nature of an easement has been once exercised and located, the location and definite course so fixed cannot be changed without the acquiescence and consent of both parties. *Evangelical Lutheran St. John's Orphan Home* v. *Buffalo Hydraulic Assn.*, 64 N. Y. 561; *Onthank* v. *Lake Shore & M. S. R. R. Co.*, 71 id. 196; *Stephens* v. *New York, O. & W. R. Co.*, 175 id. 83; *Burlew* v. *Hunter*, 41 App. Div. 151; *Hines* v. *Hamburger*, 14 id. 577.

For many years prior to the contracts of January, 1900, the discharged waters after leaving the defendants' wheel pits flowed down and over the talus or slope of land owned by the plaintiff, and under the authorities cited, we are of the opinion the defendants would have had no legal right to divert the waters to other parts, or to have insisted on the right to have constructed either a tunnel or canal across the lands of the plaintiff. In any event, the contracts of January 1, 1900, put an end to all such claims.

In these actions the defendants have endeavored to relieve themselves from the obligations and duties imposed by the agreements of January 1, 1900, in so far as such agreements confer rights on the plaintiff to 1190 construct the tunnel and flume referred to in these

contracts. It is only fair to observe that for fifteen years the parties to those agreements operated under them without objections to any of the terms and conditions thereof, and it was not until the plaintiff took steps toward availing itself of the rights conferred that the defendants repudiated the obligations imposed on them. This repudiation, however, does not go to a repudiation of the entire contracts, but only to that portion thereof relating to the construction of the tunnel. The defendants, in other words, seek to retain for themselves all the benefits secured by the agreements in question with repudiation of one of the essential provisions for the benefit of the plaintiff. They desire to retain the benefits without, on the other hand, recognizing the burden. This attitude on the defendants' part does not appeal to the equitable consideration of the court. In any event, the recognition by the defendants for some fifteen years of the contract by availing themselves and enjoying the benefits of the agreements made in 1900, must be deemed strong, if not a controlling circumstance in the disposition of these cases.

It is urged by the defendants that these actions are in the nature of ones for specific performance, as well as one for injunctive relief, and in so far as it partakes of the nature of specific performance, it cannot be maintained. The sum and substance of the defendants' argument is that the agreements between the parties leave to the future an agreement between them as to the location and specifications of the tunnel to be constructed, and that specific performance cannot be maintained to compel the meeting of the minds of parties to such an agreement.

We think the actions here brought cannot be deemed, in any sense, ones for specific performance, but rather ones for simply injunctive relief.

* * * * * * * * * *

1191 Studying the contracts in question, we are impressed with the fact that nothing remains to be

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done by the defendants under them saving to permit the plaintiff to proceed with the construction of the tunnel in accordance with the grant contained in the contract with each. We construe each of these instruments as actually conferring an easement for the construction of a tunnel under and across its property; a present easement rather than an agreement to give one in the future. We think it an executed, rather than an executory contract.

* * * * * * * * * *

1198 Reviewing the whole case, we are unable to discover good or sufficient reasons for denying the plaintiff the rights conferred by the contracts in question, and, therefore, direct judgments in the plaintiff's favor for the relief demanded in the complaint with costs of the actions.

Judgments accordingly.

Opinion of Appellate Division, Fourth Department, November 23, 1921, 198 (N. Y.) App. Div. 644, 191 N. Y. Supp. 12 (Extracts.)

1199 Hydraulic Power Company of Niagara Falls, Respondent, *v.* Pettebone-Cataract Paper Company, Appellant.

Hydraulic Power Company of Niagara Falls, Respondent, *v.* Cataract City Milling Company, Appellant.

Fourth Department, November 23, 1921.

Injunction—subjects of protection and relief—actions to enjoin defendants from interfering with construction of tunnel along Niagara river in accordance with pre-existing contracts—actions not for specific performance—equity—equity is always open to prevent breach of contract where remedy at law is inadequate and judgment decreeing relief will be adapted to exigencies of proof at close of trial—waiver—refusal to carry out provisions of contracts constitutes waiver and breach by defendants barring assertion of claim in equity—contracts not

unconscionable or unilateral where evidence indicates all pending matters were subject of calm and deliberate adjustment—doctrine of laches as predicated in estoppel not applicable—corporations—merger not inoperative to carry over contractual rights invoked in action where there has been definite adoption of obligations—Appellate Division may pass on requests to find.

[Headnotes from Vol. 198, Appellate Division Reports.]

In actions to enjoin the defendants from interfering with the construction of a tunnel and appurtenances along the bank of the Niagara river for the purpose of collecting the water discharged by the mills adjacent thereto, it appeared that the plaintiff and defendants, each of whom maintained plants for the generation of electric power along the river, entered into contracts settling existing controversies between them and providing for the construction of the tunnel at a future date and binding their successors and assigns; that nearly fifteen years after the delivery of the contracts (the plaintiff's predecessor having been merged into the plaintiff) written notice was served on the defendants by the plaintiff, outlining its purpose to construct the tunnel and submitting a sketch. At this point the defendants adopted a policy of antagonism to the work, and repudiated the contracts by refusing to join an engineering conference provided for by the contracts.

Held, that the actions are not actions for specific performance, since the judgments awarded do not contain any mandatory or directory provisions;

That equity being always open to prevent breach of a contract where the remedy by way of damages in an action at law is inadequate, the judgment decreeing relief herein will be adapted to the exigencies of the proof as they exist at the close of the trial and without limitation by the form of the allegations in the complaint indicative of a purpose to seek specific performance;

1200 That the refusal of the defendants to carry out the

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provisions of the contracts amounts to both a waiver of such provisions and a breach of the contracts, and they cannot be heard in a court of equity to assert their own breach in support of claimed invalidity flowing therefrom;

That it cannot be said that the contracts were unconscionable and unilateral, since all pending matters concerning the provisions thereof were the subject of calm and deliberate adjustment;

That the doctrine of laches, as predicated in estoppel, does not apply, since the contracts, in their express provisions, recognize the fact that the right was not to be enjoyed until some time in the future, and it appears that there was no effort to enjoy the privileges for nearly fifteen years;

That the merger between the plaintiff and its predecessor was not inoperative to carry over the contractual rights invoked, since the board of directors of the plaintiff definitely assumed all the obligations of its predecessor, and, even if that were not so, the effort of the plaintiff to establish its right to the enjoyment of the benefits of the contracts, would necessarily estop it from repudiating the burdens thereunder.

The Appellate Division has the power to pass upon requests to find where the trial court, inadvertently, fails so to do.

Appeal, in the first above-entitled action, by the defendant, Pettebone-Cataract Paper Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Niagara on the 14th day of July, 1920, upon the decision of the court rendered after a trial at the Erie Special Term.

Appeal, in the second above-entitled action, by the defendant, Cataract City Milling Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Niagara on

the 14th day of July, 1920, upon the decision of the court rendered after a trial at the Erie Special Term.

Louis Marshall and *William W. Storrs,* for the appellants.

Edward E. Franchot, for the respondent.

LAMBERT, J.:

These actions involve identical issues and differ only slightly in their facts. They were tried together and come to this court upon a single record. Decision in one necessarily controls in the other.

1201 The plaintiff is the owner of a hydro-electric system at Niagara Falls. By means of a canal it taps the Niagara river above the falls and conveys water therefrom to a basin located on the high bank of the river below the falls. From this basin the water is carried over the bank onto turbines near the river level and thereby much electric power is generated.

The defendants by mesne conveyances (the details of which are not of controlling significance) are respectively the owners of certain water rights, by virtue of which they take and have for years taken quantities of water from such basin and conducted the same to turbines upon their properties and thereby generated electrical power for their own private uses.

The defendants' title extends only to the edge of the high bank below the falls. That bank is about 215 feet above water level in the river. Between that title and the margin of the stream is the slope of the bank (of varying width) which is owned by the plaintiff.

The turbines of the defendants are located about 100 feet below the top of the high bank and after the water was run onto those turbines it was formerly discharged on the sloping bank so owned by the plaintiff, down which it flowed into the river.

Prior to the making of the contracts of January 1, 1900, hereinafter discussed at length, the plaintiff's predecessor

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(The Niagara Falls Hydraulic Power and Manufacturing Company) owned those rights and equities, important here, and which, it is now claimed, have passed to this plaintiff by virtue of a merger of such predecessor into the present plaintiff corporation.

The controlling element in these litigations is to be found in the construction and effect of two certain contracts between plaintiff's predecessor on the one part and the defendants respectively on the other, which contracts were made as of January 1, 1900.

Prior to the making of those agreements (which are substantially identical in form) controversies had arisen between plaintiff's predecessor and each of the defendants respecting the past usage by such defendants of water from such basin. There was then pending at least one litigation arising out of such controversies and the re-
spective rights of the parties had led to numerous
1202 and conflicting claims. After considerable nego-
tiations and with the aid of able counsel upon each side those contracts were made.

Such recite the pendency of differences and disputes and of a suit involving the relative water rights of the parties and a purpose to adjust all such matters in such contract. Such contracts definitely fix the quantity of water to which each of the defendants is entitled, in cubic feet per second. They fix payment for excess water used in the past and detail at great length the methods and agreements for the measuring of the water to be used in the future. They then treat of the matter here involved and in connection therewith recite as follows:

"And whereas, it is contemplated by said party of the second part, that it will sometime in the future construct a tunnel, flume or other conduit along or within the easterly bank of Niagara River for the purpose of collecting the water discharged by the mills operating on the top of said bank, and otherwise flowing over said bank, and of accumulating such water and making use of the same, in the

development of power on the lower portion of said bank."

Then therein follow detailed provisions which accomplish the following results:

First. The granting of a right to construct the tunnel and appurtenant constructions for the collection and utilization by plaintiff of the waste water from defendants' turbines.

Second. Provision for contingencies of construction, operation and repair.

Third. Provision that such tunnel should be at least seventy-five feet below the surface.

Fourth. Provision for submission of plans and sketch to the defendants, prior to the commencement of construction.

Fifth. Provision for written objection by the defendants within thirty days.

Sixth. Provision that, upon the occurring of differences as to the practicability of the plans submitted, the engineers of the parties should confer in attempting an adjustment.

Seventh. Provision that, if such engineers should be unable to agree, then that a third engineer should be called in.

Eighth. That if there should arise inability to
1203 agree upon the third engineer, then that such third engineer should be the chief engineer of the Holyoke Water Power Company.

Ninth. A general acquittance between the parties.

Tenth. A provision in the following words: "It is hereby mutually understood and agreed that this agreement shall bind and inure to the benefit of the parties named and also to their respective successors and assigns."

Eleventh. A provision in the following words: "In case of the sale by said party of the second part of all its prop-

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erty and franchises to a corporation which shall assume its liabilities, and it shall thereupon be deemed advisable to dissolve said party of the second part, it is further agreed by said first party that in such case it will consent to the substitution of said purchasing corporation in place of said second party, and will look to it, said purchasing corporation, for the fulfillment of all the obligations which it shall assume."

In 1914 (nearly fifteen years after the delivery of such contracts) (the plaintiff's predecessor having then been merged into the plaintiff) plaintiff served written notice on the defendants of its purpose to commence construction of the tunnel and appurtenances, and submitted a sketch in connection therewith. Very clearly, this was an effort upon the part of the plaintiff to literally comply with the provisions of this contract and embodied the assertion upon its part of its ownership by succession to the rights of its predecessor thereunder.

Both defendants immediately adopted a position antagonistic to that on the part of the plaintiff and, after various correspondence on the subject, definitely took the position that each repudiated said contract and all of its provisions and such defendants refused to join in any engineering conference and entirely failed and omitted to participate either in conference or in the selection of a third engineer. After waiting the period of time contemplated by such contract the plaintiff called in the chief engineer of the Holyoke Water Power Company and that engineer and the engineer of the plaintiff passed on and approved (with some slight modification) the contemplated plans of plaintiff for the construction of such tunnel.

It is thus seen that the plaintiff in the detail of
1204 the establishment and adoption of its plan of construction has followed specifically the provisions of such contract. It is equally plain that each defendant was then and has since continued to repudiate all effect of such contract and has adopted a policy of obstruction to the progress of this work.

Upon threatened prevention of the prosecution of such work, these actions were brought. They were originally tried before Mr. Justice EMERY, but his death occurred prior to decision thereof. The evidence taken before him was then stipulated before Mr. Justice WHEELER; some slight additional proof was taken and the matter was submitted to the latter, who has rendered the decision as to which complaint is now made. (112 Misc. Rep. 528.)

From recitals in the briefs it is now apparent that since judgment and pending these appeals, the plaintiff has actually constructed its tunnel and actually consummated its claimed rights under this contract. It is also stated therein that such has been accomplished without any damage or injury to either of the defendants.

The judgments enjoin the defendants from obstructing or interfering with the progress of such work; decree liability against the defendants for damages occurring through past obstruction and interference; and direct reference to ascertain the amount of such damage.

* * * * * * * * * *

1210 In each case, judgment affirmed, with costs. Additional findings of fact made as stated in order filed.

Applicant's Exhibit 9.

1211 THE NIAGARA FALLS POWER COMPANY

APPLICATION

To FEDERAL POWER COMMISSION

FOR LICENSE

As Per Regulation 6

Issued Under the Act of June 10, 1920

WITH EXHIBITS

A, B, C, G, H, I, J, K, L, M and N

Attached

Exhibits D, E and F are Drawings

Bound in a Separate Cover

JANUARY 3, 1921.

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1212 APPLICATION FOR LICENSE

Form 4

As Per Regulation 6-B

(See Regulation 2 and 4, or 2 and 5)

(Act of June 10, 1920, Public 280, 66 Cong.)

THE NIAGARA FALLS POWER COMPANY, a corporation organized and existing under and by virtue of the Laws of the State of New York and having its office and principal place of business at NIAGARA FALLS in the STATE OF NEW YORK, does hereby make application to the Federal Power Commission for a license for the project described herein and shown on general and detail maps signed by the applicant on the third day of January, 1921, which maps are filed herewith and made a part hereof, said license to authorize the construction, operation and maintenance of certain project works, the principal ones of which are designated as follows on said maps:

(a ..... Dams and Reservoirs) None

1213 (b ..... Proposed Water Conduits)

* * * * [8.]

PROPOSED STATION NO. 2 EXTENSION

(being built)

Forebay

Located about 100 feet below surface of ground near edge of cliff under the Cataract City Milling and Pettebone-Cataract Paper Company.

Consisting of excavated chamber in solid rock, together with concrete lining, weirs, gates and appurtenances.

NOTE: The water 262.6 c.f.s. will be discharged into this forebay from the tailrace of the Cataract City Milling Company and the Pettebone-Cataract Paper Company.

(See Exhibit "F", sheets #3 and #11)

Tunnel

Located about 100 feet below the surface of ground near the edge of cliff. Carries water from Station No. 2 Extension forebay to penstock #1 of Station No. 2.

Consists of excavation in solid rock together with concrete lining, regulating weir and appurtenances.

(See Exhibit "F", sheets #3 and #11)

Penstock

Located under the cliff leading from above tunnel into north end of Station No. 2.

Consists of 8 foot diameter steel plate penstock, supports, valves and appurtenances.

(See Exhibit "F", sheets #3 and #11)

* * * * [13.]

1214 (c ..... Proposed Power Houses)

(continued)

HYDRAULIC PLANT

Power House for Station No. 2 Extension

The north end of existing Station No. 2 Power House will be used for this generating unit marked "A" until the construction of unit #24 of Station No. 3 Extension. When it will be moved to a point north of unit #21 in Station No. 3 Extension.

(See Exhibit "D", sheet #2)

(See Exhibit "F", sheets #3 and #11)

Proposed Power House for Addition to Station No. 3 Extension

Location below cliff to be attached to and extend up-stream from existing Power House, Station No. 3 Extension.

Consists of concrete foundations; walls of rubble masonry and concrete with steel frame; roof of reinforced con-

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crete supported by steel trusses; together with appurtenances.

(See Exhibit "D", sheet #2)
(See Exhibit "F", sheets #3 and #6)

* * * * [23.]

1215 The following Exhibits are filed herewith and are hereby made a part of this application.

Exhibit A: A certified copy of articles of incorporation of the applicant.
Exhibit B: Official statement of the completion of organization and list of officers.
Exhibit C: Statement of local franchise for power transmission and distribution.
Exhibit D: General and detail maps of project area.
Exhibit E: General and detail maps of transmission system.
Exhibit F: Detail and design drawings.
Exhibit G: Description of mechanical, electrical and transmission equipment.
Exhibit H: Statement of the effect on the flow of the Niagara River.
Exhibit I: Estimate of the power capacity of each project.
Exhibit J: Estimated cost of the proposed power projects.
Exhibit K: History of project works already constructed.
Exhibit L: Statement of fair value of Niagara Falls Power Company.
Exhibit M: Statement of applicant's financial ability.
Exhibit N: Photographs of some of the principal existing structures. [24.]

1216 In Witness Whereof the applicant has caused its name and corporate seal to be hereunto signed and

affixed by its President thereunto duly authorized this 3rd day of January, 1921.

THE NIAGARA FALLS POWER COMPANY,
By PAUL A. SCHOELLKOPF,
President.

Attest:

F. L. LOVELACE,
Secretary.

* * * * [6.]

EXHIBIT "G" (continued)

1217 MECHANICAL EQUIPMENT OF PROPOSED PLANTS

A. *Hydraulic Plant*

1. *Station No. 2 Extension*

(a) *Turbine*

Number of Units:	1.
Capacity:	3130 H.P.
Type:	Single runner, vertical shaft
Speed:	300 R.P.M.
Governor:	Gate operating device only

(b) *Auxiliary Equipment in Power House*

Will use cranes and appurtenances of existing Station No. 2

2. *Proposed Addition to Station No. 3 Extension*

(a) *Turbines and Governors*

Number of Units:	5
Capacity:	5 37,500 H.P.
Type:	Single runner, vertical shaft
Speed:	150 R.P.M.
Governors:	5 hydraulic automatic governors

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(b) *Auxiliary Equipment in Power House*
Governor Pumping System, Oil and Water System, etc. Will use electric traveling cranes in existing Station No. 3 Extension.

(c) *Forebay Equipment*
Steel racks and electric traveling cranes, steel ice deflector, etc.

* * * * [9.]

EXHIBIT "G" (continued)

1218 ELECTRICAL EQUIPMENT OF PROPOSED STATIONS

HYDRAULIC PLANT

1. *Station No. 2 Extension*

1—2500 K.V.A., 25 cycle, vertical shaft, revolving field generator to be installed in present building with exciter and switching, control, and auxiliary apparatus.

2. *Addition to Station No. 3 Extension*

To contain five (5) 32,500 K.V.A., 25 cycle, vertical shaft, revolving field generators with exciters, and switching, control and auxiliary apparatus.

* * * *

EXHIBIT "I"

Regulation 6-E as specified in Regulation 4-J

The Power Capacity of this project computed from the continued product of .08 x av. static head x quantity of water in accordance with the definition of terms (Regulation i-0) is as follows:

TABLE I

Existing Developments

Plant	Mean Static Water Levels Upper River & Middle Pool		Mean Static Head Upper River to Middle Pool	Quantity of Water	Power Capacity H.P.
	Head	*Tail*			
Hydraulic Station No. 2 D. C.	562.0	343.5	218.5	900	15732
Hydraulic Station No. 3 D. C.	562.0	343.0	219.0	1750	30660
Hydraulic Station No. 3 A. C.	562.0	343.0	219.0	3795	66488
Hydraulic Station No. 3 Extension	562.0	342.5	219.5	4830	84815
Hydraulic Water Users	562.0	458.2	103.8	162	1345
Hydraulic Water Users	562.0	470.7	91.3	100	730
Hydraulic Waste Niagara	562.0	411.0*	151.0*	38 8425	101774
				20000	301544

* Tail race tunnel.

BLEED THROUGH-

COPY BOUND VERTICALLY

The actual Power Capacity of this project computed from the output of the completed plants under operating conditions is as follows:

TABLE II

Existing Developments

Plant	Mean Operating Water Levels *Head*	*Tail*	Mean Head Forebay To Tailrace	Quantity of Water	Operating Power Capacity Kw.	H.P.
Hydraulic Station No. 2 D. C.	559.5	346.0	213.5	900	9850	13200
Hydraulic Station No. 3 D. C.	559.0	346.4	212.6	1750	25000	33512
Hydraulic Station No. 3 A. C.	559.0	346.4	212.6	3795	56450	75670
Hydraulic Station No. 3 Extension	559.5	342.5	217.0	4830	78000	104557
Hydraulic Water Users	559.5	458.2	101.3	162)**		1700*
Hydraulic Water Users	559.5	470.7	88.8	100)**		
				38		
Hydraulic Waste Niagara	561.6	419.0	142.6	8425	71350	95643
				20000	240650	324282

NOTES:

1. Operating Power capacities are computed from Power Discharge curves approved by the U. S. Engineer Department for regulating the use of water under the Treaty. These curves show discharges under general average conditions of head water and tail water for power at switchboard.

2. Operating water levels as shown allow for the loss of head from Upper River to Basin.

** 3. 262 c.f.s. will be used first in customer's plants under part of the total available head and then in the company's plant under the remaining head. Second development now under construction.

* 4. Power capacities of water users plants are estimated only.

EXHIBIT "I" (Continued)

When the proposed works shall have been constructed the Power Capacity of this project computed from the combined product of .08 x av. static head x quantity of water in accordance with the definition of terms (Regulation I-0) is as follows:

TABLE III (8 Units in Station 3 Extension)
(Station 2 in Service)

Proposed Developments

Plant	Mean Static Water Levels Upper River & Middle Pool		Mean Static Head Upper River to Middle Pool	Quantity of Water	Power Capacity H.P.
	Head	*Tail*			
Hydraulic Station No. 2 D. C.	562.0	343.5	218.5	900	15732
Hydraulic Station No. 2 Extension	462.0	343.0	119.0	262*	2494
Hydraulic Station No. 3 D. C.	562.0	343.0	219.0	1750	30660
Hydraulic Station No. 3 A. C.	562.0	343.0	219.0	3850	67452
Hydraulic Station No. 3 Extension	562.0	342.5	219.5	13200	231792
Hydraulic Water Users	562.0	458.2	103.8	162)	1345
Hydraulic Water Users	562.00	470.7	91.3	100)	730
Hydraulic Waste Niagara Plant	562.0	411.0**	151.0**	38 0	Reserve
				20000	350205

* 262 c.f.s will be used first in customer's plants under part of the available head and then in the company's plant under the remaining head.

** Tail race tunnel

BLEED THROUGH-

COPY BOUND VERTICALLY

** Tail race tunnel.

EXHIBIT "I" (Continued)

The Power Capacity of this project when the proposed works shall have been constructed will be as follows:

TABLE IV (8 Units in Station 3 Extension)
(Station 2 in Service)

Proposed Developments

Plant	Mean Operating Water Levels Forebay and Tailrace *Head*	*Tail*	Mean Head Forebay To Tailrace	Quantity of Water	Normal Power Capacity Kw.	H.P.
Hydraulic Station No. 2 D. C.	559.5	346.0	213.5	900	9850	13200
Hydraulic Station No. 2 Extension	462.0	346.0	116.0	262**	2335	3130
Hydraulic Station No. 3 D. C.	559.0	346.4	212.6	1750	25000	33512
Hydraulic Station No. 3 A. C.	559.0	346.4	212.6	3850	57200	76676
Hydraulic Station No. 3 Extension	559.5	342.5	217.0	13200	212800	285256
Hydraulic Water Users	559.5	458.2	101.3	162)		1700*
Hydraulic Water Users	559.5	470.7	88.8	100)		
				38	0	0
Hydraulic Waste Niagara Plant	561.6	419.0	142.6	0	Reserve	Reserve
				20000	307185	413474

NOTES:

1. Normal Power Capacities are computed from Power Discharge Curves approved by the U. S. Engineer Department for regulating the use of water under the Treaty. These curves shows discharges under general average conditions of headwater and tailwater for power at switchboard.

2. Operating water levels as shown allow for the estimated loss of head of 2.5 feet from Upper River to Basin.

**3. 262 c.f.s. will be used first in customer's plants under part of the total available head and then in the company's plant under the remaining head.

* 4. Power capacities of water users plants are estimated only.

1223 EXHIBIT "I" (continued)

These foregoing tables are a part of the Application for License made by the undersigned this 3rd day of January, 1921.

THE NIAGARA FALLS POWER COMPANY,
By PAUL A. SCHOELLKOPF,
President.

JOHN L. HARPER,
Chief Engineer.

* * * * *

1224 EXHIBIT "J" (continued) [2]

ESTIMATED COST OF STATION NO. 2 EXTENSION

Unit "A"

This consists of the construction of a tunnel and forebay from the outlets of the Pettebone Paper Company and the Cataract Milling Company to penstock #1 of Station No. 2 and installing 1—3,130 H.P. Unit at the north end of Station No. 2. Head 116 feet, Quantity 262.6 c.f.s.

See Exhibit "F", Sheets #3 and #11.

1.	Tunnel Excavation 700 yds. @ 12.00	8,400
2.	Forebay Excavation 1300 yds. @ 12.00	15,600
3.	Overflow Weir Excavation 200 yds. @ 12.00	2,400
4.	Tunnel Lining Concrete 290 yds. @ 20.00	5,800
5.	Forebay Lining Concrete 200 yds. @ 18.00	3,600
6.	Overflow Weir Lining 25 yds. @ 18.00	450
7.	Taintor Gate 6000# @ 20c	1,200
8.	Penstock Elbow Steel 15,000# @ 15c	2,250
9.	Reducing Elbow Steel 10,000# @ 15c	1,500
10.	Removing Tailrace Penstock 80,000# @ 1½c	1,200
11.	Removing Steel Penstock (upper section) 10,000# @ 3c	300
12.	Foundation Excavation 200 yds. @ 8.00	1,600
13.	Foundation Concrete 250 yds. @ 16.00	4,000
14.	P. H. Floor 1000 sq. ft. @ 1.00	1,000
15.	Tailrace Weir 20 yds. @ 30.00	600
16.	Cleaning up Tailrace	500
17.	1—3000 H.P. Turbine installed 39,000 + 2,000	41,000

BLEED THROUGH-

18.	1—3000 H.P. Generator installed 33,700 + 1,300	35,000
19.	Oil and Governor System	2,000
20.	Electrical Equipment	3,000
21.	Flashboard Construction & Miscellaneous	400
	Total	131,800
	Contingencies @ 10%	13,200
	Superintendence, Engineering & Overhead @ 10%	13,200
	Total	158,200
	Construction Interest for 8 months @ 8% = 3% of total	4,700
	Total Cost	162,900

* * * * * * * * * *

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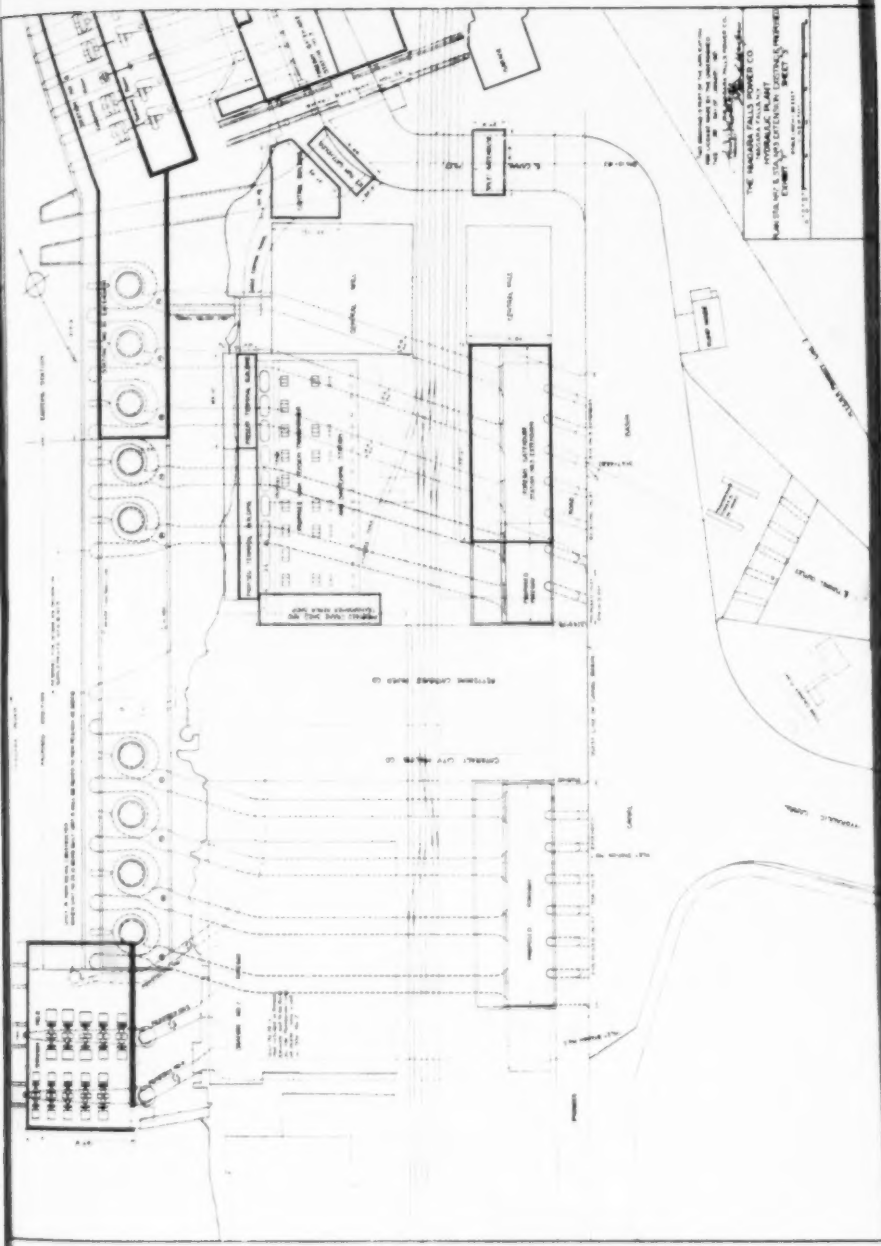
Item C By Reference
Item D To Stipulation: Applicant's Exhibit 10.



Reproduction of Exhibit "F," Sheet No. 3 to Application and License.

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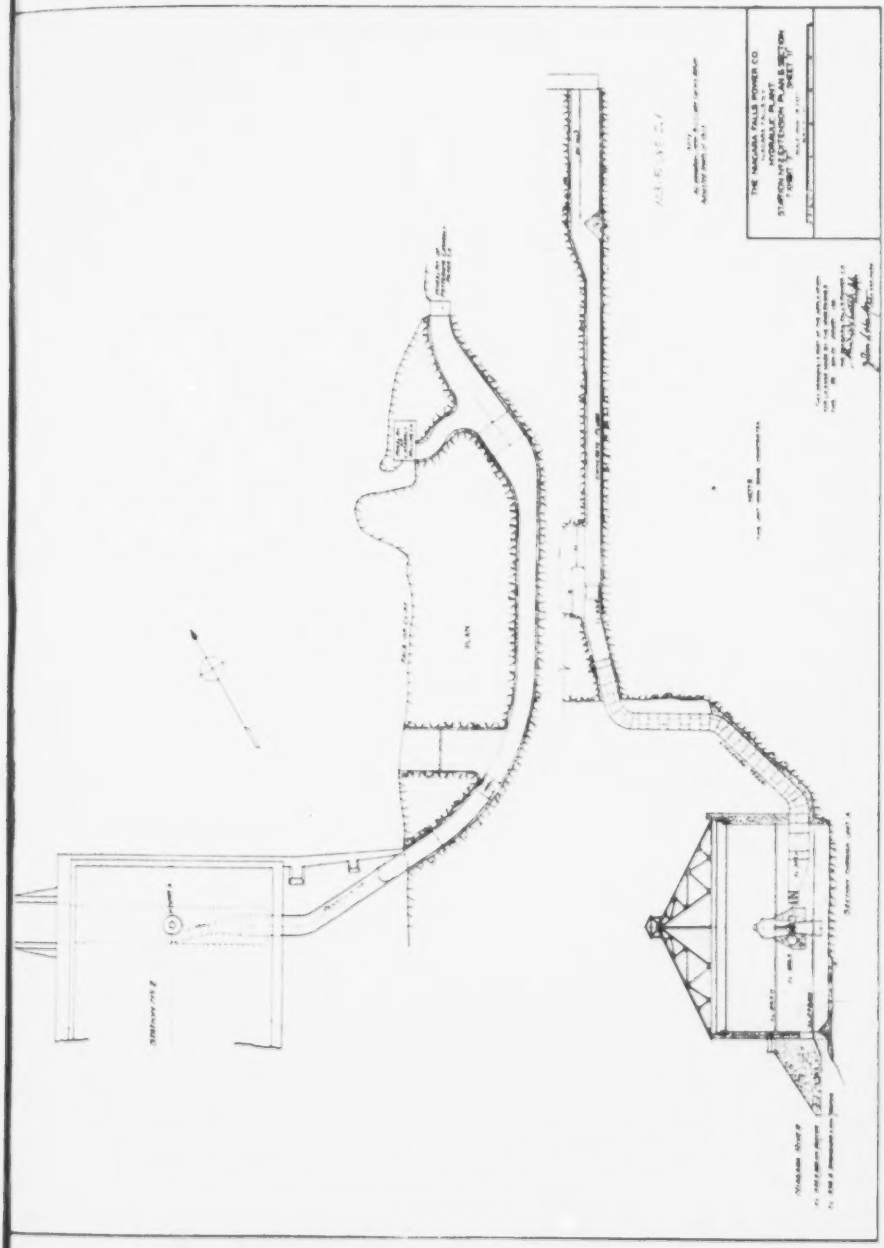
Item C By Reference
Item D To Stipulation: Applicant's Exhibit 11.



Reproduction of Exhibit "F," Sheet No. 11 to Application and License.

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Applicant's Exhibit 12.

1227 Extracts from transcript of hearings before the Federal Power Commission on January 24, 25 and 26, 1921 in the proceeding entitled "*In the Matter of the Proposed Diversion of Water from the Niagara River for Power Purposes*".

(Folio references are to the Transcript of Record in *The Niagara Falls Power Company* v. *Federal Power Commission,* United States Circuit Court of Appeals, Second Circuit, 137 Federal 2d 787, Volume IV.)

Page 2087, Folio 6261

"* * * all those companies which had been taking water and using it under a shallow head exchanged their water for electric power, with the exception of two."

Pages 2088 to 2089; Folios 6262 to 6266

"The Chairman. Is the old hydraulic canal property in this combination?

Mr. Cohn. Oh, yes.

The Chairman. Is that the source from which the two shallow water users now draw their water?

Mr. Cohn. Yes.

The Chairman. How much do they draw?

Mr. Cohn. 262 Feet per second.

The Chairman. And your application includes, of course, a combination of that much water through the hydraulic canal?

Mr. Cohn. Yes. I wish to explain that. We have been litigating with that company for a number of years, and have recently gotten a decree from the Supreme Court of the State of New York which has authorized us to enter upon their lands and take that water where they now discharge it and utilize it under the remaining head. So when that work is completed the full efficiency of that water will be used, although in two steps. They use it down 100 feet and then we take it from their point of discharge, convey it by a tunnel and use it the other 110 feet. So there is no loss of efficiency there unless the Supreme Court of the State of New York reverses its own judgment, in which event the expenditures we have made might go for naught. We had a contract with them a great

many years ago, giving us the right to use this water under the second head; but when we tried to exercise the right in 1914 they put us off their land.

1228 *Pages 2088 to 2089; Folios 6262 to 6266* (continued)

"The Chairman. What is that company?

Mr. Cohn. There are two companies; the Pettebone Cataract Power Company and the Cataract City Milling Company, both of which have very ancient grants, and both of which, I may say, are owned by the same interests.

The Chairman. But the ownership of the hydraulic canal itself is in you?

Mr. Cohn. That is in us. They merely have the right to draw so much water, the 262 feet per second it has been computed. By dropping the water the second 116 feet, we will get 3130 horsepower, leaving them undisturbed in their use of the water as they are now using it, but giving the full efficiency between the upper river and the Maid of the Mist below."

Applicant's Exhibit 13.

Project No. 16 License, as issued March 2, 1921.

[Excerpts from this exhibit are printed at pages 380-384, *infra.*]

Applicant's Exhibit 14.

Extract from Amendment No. 1 to License, Project No. 16, dated April 7, 1922.

[The text of this exhibit is printed at pages 385-386, *infra.*]

BLEED THROUGH-

Item C By Reference
Item D To Stipulation: Applicant's Exhibit 15.

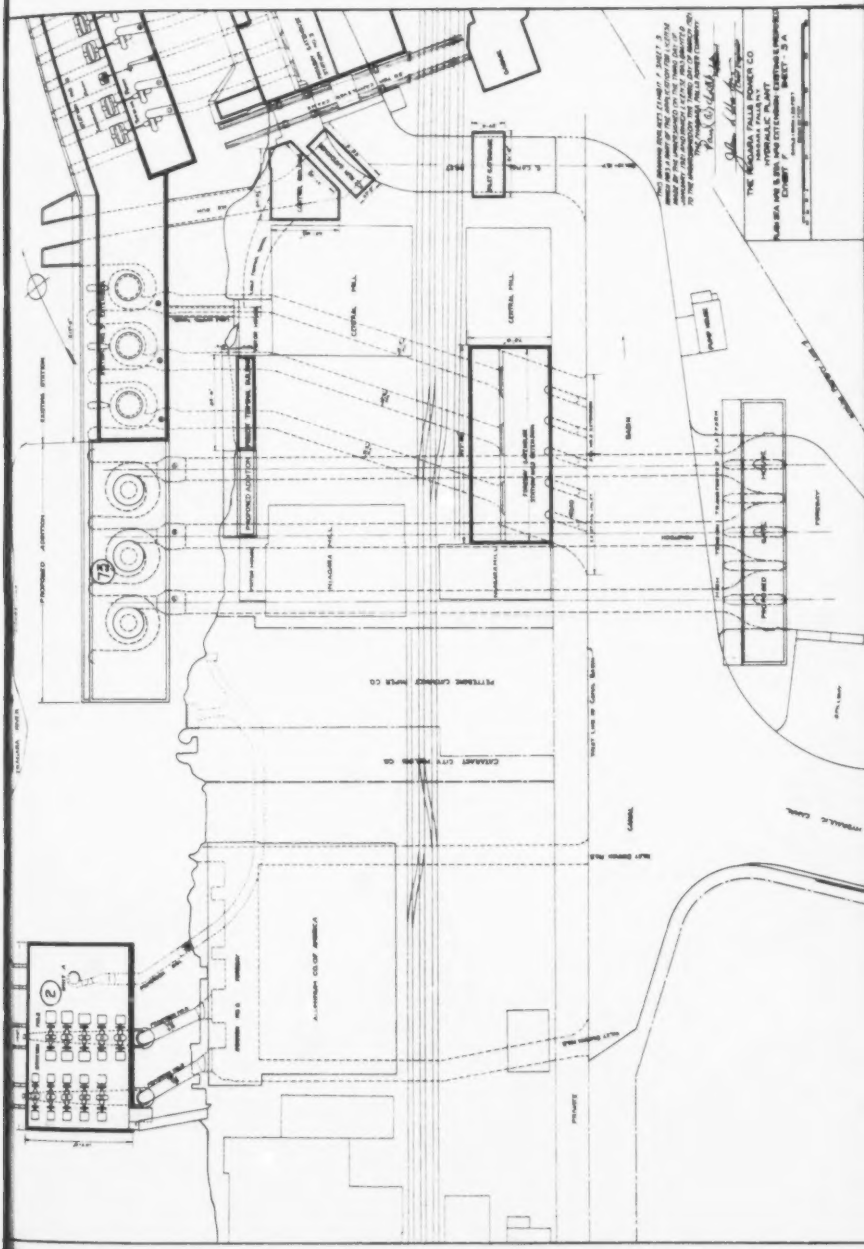

Exhibit F, Sheet No. 3-A to License, Project No. 16.

BLEED THROUGH-

Applicant's Exhibit 16.

1229 Extract from

Report of the American Members of the International Waterways Commission Regarding the Preservation of Niagara Falls,

March 19, 1906, paragraph 8, subparagraph I.

"8. I. NIAGARA FALLS HYDRAULIC POWER AND MANUFACTURING COMPANY.— * * * The Company is now using about 4,000 cubic feet per second. It is extending its works, and expects to develop about 134,000 horsepower, in addition to which its tenant companies will develop about 8,000 horsepower."

* * * * * * * * * *

Applicant's Exhibit 17.

1230 Extract from

Statement and Application of the Niagara Falls Hydraulic Power and Manufacturing Company to the Secretary of War Respecting the Diversion of Water in the United States from Niagara River, July 9, 1906.

"The canal extends from Port Day through the City of Niagara Falls to a point in the high bank of the river below the Falls, where the power houses of this Company are situated, and where the water taken from the river at Port Day, after passing through the turbine wheels in the power houses, is discharged into the lower river. There are now seventeen different parties engaged in manufacturing whose plants are located upon the property of this Company, and about sixty smaller users of power located in the City at large who take power from this Company, and to supply them with the power now actually in use requires, as nearly as can be estimated, four thousand cubic feet of water per second."

* * * * * * * * * *

Applicant's Exhibit 18.

1231 Extract from

Report by Charles W. Kutz, Captain, Corps of Engineers, U. S. Army, to the Chief of Engineers, October 5, 1906 (attached to the Report of the American Members of the International Waterways Commission to the Secretary of War, dated November 15, 1906).

"GENERAL: 1. Referring to the orders of the Sec
tary of War, dated July 14, 1906, in reference to
power situation at Niagara Falls, and to the rep
dated August 15, 1906, in reference to the Canad
power companies, and their associated transmiss
companies, I now have the honor to submit a rep
in reference to those companies seeking permits
divert water on the American side.

* * * * * * * *

"THE NIAGARA FALLS HYDRAULIC POWER AND MANUF
TURING COMPANY

* * * * * * * *

"21. The company disposes of its power in th
ways. First, it sells water to six corporations, w
develop power with their own machines. This wa
is used under heads varying from 50 to 125 feet, w
an average head, considering the quantities used
each elevation, of about 90 feet, or less than one-h
of the maximum effective head. The amount of wa
so furnished is computed to be 1,332 cubic feet
second."

* * * * * * * * *

Excerpts from Applicant's Exhibit 19.

1232 NIAGARA FALLS HYDRAULIC POWER A
MANUFACTURING COMPANY. PERM
FOR THE DIVERSION OF WATER FR
THE NIAGARA RIVER FOR POWER PU
POSES.

WHEREAS, Under the provisions of an Act of Congr
approved June 29, 1906, entitled "An Act for the Cont
and Regulation of the Niagara River for the Preservat
of Niagara Falls and Other Purposes," it is provided t
the Secretary of War may grant permits for the divers
of water in the United States from said Niagara River
its tributaries for the creation of power, and that it sh
not be lawful to divert water from said river, for power p
poses, except in accordance with permits so issued by
Secretary of War; and

BLEED THROUGH-

WHEREAS, upon the applications, hearings, reports and all the proceedings by applicants for permits under the provisions of the said Act, the Secretary of War, under date of January 18, 1907, filed a written opinion directing, among other things, that a permit be issued to the Niagara Falls Hydraulic Power & Mfg. Co. for the diversion of 6,500 cubic feet per second,

NOW, THEREFORE, this is to certify that the Secretary of War hereby gives permission to the Niagara Falls Hydraulic Power and Manufacturing Company to divert 6,500 cubic feet of water per second from the Niagara River upon the following terms and conditions:

FIRST: The amount above named, 6,500 cubic feet per second, represents the maximum quantity of water that can be diverted at any time under the terms of this permit.

SECOND: The grantee shall make, under the supervision of an authorized inspector of the United States, measurements in its intake canals of such a character and at such times as may be deemed necessary to show the amount of water diverted.

THIRD: The grantee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of its customers to whom water power or mechanical horse power is furnished.

1233 FOURTH: The power stations of the grantee and of its customers, to whom water power or mechanical horse power is furnished, together with their operating records shall be subject to inspection at all times by authorized inspectors of the United States.

FIFTH: This permit is issued without any determination of priority of right to divert water from the Niagara River between the parties to whom permits, for diversion, may be issued.

SIXTH: The grantee shall carry out in good faith the obligations which it assumed in its letters to the War Department, or to the representatives of that Department, concerning the improvement of the scenic conditions on the American side of the Gorge below the Upper Arch Bridge.

SEVENTH: The Secretary of War reserves the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the Act of June 29, 1906, under which this permit is issued.

Witness my hand this sixteenth day of August, 1907.

(Signed) WM. H. TAFT,
Secretary of War.

1236 EXTENSION OF PERMIT

WAR DEPARTMENT
21644 Washington
September 2, 1911.

Gentlemen:

By joint resolution of Congress approved August 22, 1911, (Public Resolution—No. 9) the provisions of the Act entitled "An Act for the control of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," are extended and reenacted from June 29th, 1911, the date of the expiration of the operation of said Act, to March 1st, 1912.

In accordance with the foregoing, I beg to advise you that the permit heretofore granted to your Company by the Secretary of War, dated August 16th, 1907, under the provisions of the Act of Congress approved June 29th, 1906, (34 Stat. L., 626) authorizing the diversion of water

BLEED THROUGH-

from the Niagara River, is hereby extended, subject to the provisions and conditions thereof, the terms of the act cited and the joint resolutions extending the same.

Acknowledgment of receipt of this letter is requested.

Very respectfully,

(Signed) JOHN C. SCOFIELD,
Assistant and Chief Clerk
For the Secretary of War in his absence.

To—

Niagara Falls Hydraulic Power and Manufacturing Company.

1238 EXTENSION OF PERMIT.

WAR DEPARTMENT
Washington.

April 23, 1912.

Gentlemen:

By Joint Resolution of Congress approved April 5, 1912, (Public Resolution—No. 24) the provisions of the act entitled "An Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," are re-enacted and extended from March 1st, 1912, the date of the expiration of said act to March 4, 1913.

In accordance with the foregoing, I beg to advise you that the permit heretofore granted to your company by the Secretary of War, dated August 16th, 1907, under the provisions of the Act of Congress approved June 29th, 1906, (34 Stat. L., 626) authorizing the diversion of 6,500 cubic feet of water per second from the Niagara River, is hereby extended, subject to the provisions and conditions

thereof, the terms of the act cited and the Joint R
tions extending the same.

Acknowledgment of receipt of this letter is request

Very respectfully,

(Signed) H. L. Stimso
Secretary of W

To—

Niagara Falls Hydraulic Power and Manufact
Company.

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* * * * * * * * *

1240 OPINION.

Office of the Attorney General,
Washington, D. C.,
April 30, 1

The Secretary of War.

Sir:

I have the honor to reply to your letters of March
10, 1913, asking my opinion concerning the power
duties of this Government and its officers over the
sion of waters from the Niagara River.

First, you wish to know whether the so-called B
Act, entitled "An Act for the control and regulation
waters of Niagara River, for the preservation of Ni
Falls, and for other purposes," approved June 29,
(34 Stat. 626), prohibiting the diversion of water fro
Niagara River without the consent of the Secreta
War, is still in force.

By section 5 of that Act its operation was exp
limited to three years. This period was twice ext
expiring by limitation on March 4, 1913 (35 Stat. 11
Stat. 631). The Act therefore ceased to be in force
that date and any outstanding permits for the divers
water issued thereunder by the Secretary of War ex
at the same time.

BLEED THROUGH-

Secondly, you inquire as to the application of section 10 of the Rivers and Harbors Act approved March 3, 1899 (30 Stat. 1121, 1151). That section reads as follows:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any Wharf, pier, delphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Sec-
> 1241 retary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

I am of opinion that under this law any diversion of water from the Niagara River in such quantity as substantially to interfere with the navigable capacity of that river or the connected lakes, or which in any substantial degree alters or modifies the course, location or channel of either of those waterways, is prohibited unless in advance recommended by the Chief of Engineers and authorized by the Secretary of War.

According to my view Congress did not intend by this act, assuming that it had the power, to prohibit every diversion from navigable waters of the United States but only diversion producing or causing substantial interference with the navigability of such waters or substantially altering their courses, locations or channels, whether there has been a substantial interference or alteration is a question of fact, to be determined in the first instance by the Secretary of War, whose conclusions in that regard while

doubtless not final should certainly be very persuasive with the courts.

In *United States v. Rio Grande Irrigation Company* (174 U. S. 690, 709), the Supreme Court, construing a somewhat similar statute, said:

> "* * * Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interferes with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, 1942 whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact."

Under the provisions of law in question I think it is within your power to exercise supervision over diversions of water from the Niagara River in order to prevent diversions in such quantity as would substantially interfere with the navigable capacity or with the course, location or channel of that river or of the connected lakes.

Any such prohibited diversions that may be discovered by your Department should be reported to this Department, whose duty it will be to stop and prevent them by injunction or by criminal prosecution under section 12 of the same Act, which is as follows:

> "That every person and every corporation that shall violate any of the provisions of sections nine, ten and eleven of this Act, or any rule or regulation made by the Secretary of War, in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be

BLEED THROUGH-

enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

Thirdly, you inquire as to the application of the treaty proclaimed May 13, 1910 (36 Stat. 2448), between Great Britain and the United States by which the latter bound itself not to permit any greater diversion of water from the American side of the Niagara River than 20,000 cubic feet per second.

1243 I do not find that that treaty imposes any duties directly upon the Secretary of War, and you do not state any facts showing that you have been called upon to take any action depending upon its construction.

Section 356 of the Revised Statutes relating to the giving of opinions by the Attorney General provides that:

> "The head of any Executive Department may require the opinion of the Attorney General on any questions of law arising in the administration of his Department."

This provision has always been understood to mean that the Attorney General should give his opinion to the head of a Department only upon a question which has actually arisen in the administration of that Department in a pending case calling for action. (6 Op. 6, 8, 24; 14 Op. A. G. 178; 18 Op. A. G. 108; 20 Op. A. G. 50, 312, 383, 420, 440, 583, 618; 21 Op. A. G. 106, 109, 167, 201, 240, 457, 478, 506, 510, 568; 22 Op. A. G. 77, 85; 24 Op. A. G. 59).

In 20 Op. A. G. 584, Attorney General Olney thus stated the rule:

> "* * * I am unable to discover in your letter or its inclosures that any official action depends in the solution of the question propounded.
>
> "If this supposition is correct the restriction contained in section 356, Revised Statutes, limiting the authority of the Attorney General to give opinions, on request of the heads of Departments, to questions of

law arising in the administration of their respective Departments prevents me from having the pleasure of furnishing the opinion requested. My predecessors have uniformly declined to give an opinion on a question not calling for the action of the Department submitting it."

In the same volume Attorney General Olney again states the rule (P. 619):

> "It has always been held by successive Attorneys-general that such opinions should be rendered only in cases where a question has actually arisen, and is at the time pending, which must be determined in 1244 order that the work of a Department may be properly administered. Moreover, my predecessors have always exhibited great and, it seems to me, proper reluctance to pass upon any question whose answer may bring this Department into conflict with a judicial tribunal."

Obviously, therefore, at this time there is no warrant for my undertaking to construe for you the treaty in question.

Fourthly, you inquire as to the authority of this Government to control the importation into this country from Canada of Electric current generated by water power from the Niagara River.

Here, again, no showing is made that you have actually been called upon to take any action depending upon the solution of the question propounded. I feel, therefore, that I should also decline to express my opinion on this point, for the reasons stated under the last heading.

As requested in your letter of March 19, I return herewith the letter to you from Mr. J. Boardman Scovell, of Niagara Falls, N. Y., dated March 17.

Very respectfully,

(Signed) J. C. McReynolds,
Attorney General.

(Enclosure No. 4039)

BLEED THROUGH-

1245 PERMIT FOR ADDITIONAL DIVERSION OF WATER FROM THE NIAGARA RIVER

Subject to the provisions of the Joint Resolution of Congress, approved January 19, 1917, "Authorizing the Secretary of War to issue temporary permits for additional diversions of water from the Niagara River," permission, revocable at will, is hereby given the Hydraulic Power Company, of Niagara Falls, New York, to divert water for power purposes additional to the six thousand five hundred (6,500) cubic feet per second, the amount of water being diverted by said company on the date of the approval of said resolution, such additional amount *not to exceed a daily diversion at the rate of two thousand two hundred and eighty-five (2,285) cubic feet per second.* This permit, unless sooner revoked, shall expire in any event with the thirtieth day of *June, nineteen hundred and seventeen,* and is subject to further conditions as follows:

1.—The permittee shall furnish the United States Engineer Officer, Lake Survey Office, Detroit, Michigan, on or before the 25th day of January, 1917, a complete list of all individuals, companies and corporations, to which it is now delivering power, or has delivered power within the past four months, together with the amount furnished to each, and the limit between which the amount *furnished to each individual, company or corporation has varied,* and shall also furnish him promptly a complete list of all individuals, companies or corporations to which additional power is furnished between this date and the first day of July, 1917, together with the amount of power alloted to each, and shall also certify in each case of the delivery of additional power, whether the individual, company or corporation to which delivery is made has increased the capacity of its power-using appliances since this date.

2.—The permittee shall make, under the supervision of an authorized inspector of the United States, measurements in its intake canals of such a character and at such times as

may be deemed necessary to show the amount of water diverted.

1246 3.—The permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to whom water power or mechanical horse power is furnished.

4.—The power stations of the permittee and of the consumers to whom water power or mechanical horse power is furnished, together with their operation records, shall be subject to inspection at all times by authorized inspectors of the United States.

5.—The Secretary of War has the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the said Joint Resolution; and the further right to revoke said permit at will.

WITNESS my hand this nineteenth day of January, 1917.

(Signed) WM. M. INGRAHAM,
Acting Secretary of War.

1247 INSTRUMENT BY SECRETARY OF WAR EXTENDING HYDRAULIC POWER COMPANY'S PERMIT OF JANUARY 19, 1917.

June 30, 1917.

War Department.

In accordance with the provisions of S. J. Res. 13, 65th Congress, approved this date, the foregoing permit is hereby continued in force until July first, 1918, subject to all of the conditions and restrictions therein contained, prompt

BLEED THROUGH-

report of all additional power furnished under this extension to be made in the manner specified in condition one.

(Signed) NEWTON D. BAKER,
Secretary of War.

1248 PERMIT FOR THE DIVERSION OF WATER FROM NIAGARA RIVER FOR POWER PURPOSES.

Subject to the provisions of the Joint Resolution of Congress, approved June 29, 1918, authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River, permission, revocable at will by the Secretary of War, is hereby given the Hydraulic Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of nine thousand five hundred cubic feet per second, and that this permission shall be subject to further conditions as follows:

1.—All work and operations of said permittee for the diversion of water, or for the operation of, or changes in, its plant and accessories, and for the distribution of power shall be subject to the general supervision and approval of such division engineer or district engineer of the Engineer Department as the Secretary of War may designate by written notice to the said company.

2.—The permittee shall make, under the supervision of an inspector authorized in writing by the said engineer, measurements in its intake canals of such character and at such times as the said engineer may deem necessary to show the quantity of water diverted.

3.—The permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to whom water power or mechanical horse power is furnished.

4.—The power stations of the permittee and of the consumers to whom water power or mechanical horse power is furnished, together with their operation records, shall be subject to inspection at all times by inspectors authorized in writing by the said engineer.

5.—All expenses of inspection shall be paid by the permittee in cases when collection from the permittee is approved by the Chief of Engineers, United States Army.

1249 6.—The permittee shall promptly furnish the said engineer upon written notice from him, such information as he may specify concerning amount of power generated and delivered, to whom delivered, and limits of variation in delivery.

7.—The Secretary of War has the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of said Joint Resolution.

WITNESS my hand this first day of July, 1918.

(Signed) NEWTON D. BAKER,
Secretary of War.

52743 Engrs.

1250 PERMIT FOR THE DIVERSION OF WATER FROM NIAGARA RIVER FOR POWER PURPOSES.

Subject to the provisions of the Joint Resolution of Congress, approved July 12, 1919, authorizing the Secretary of War to issue permits for the diversion of water from

BLEED THROUGH-

the Niagara River above the Falls for the creation of power to individuals, companies, or corporations, which are now actually producing power from the waters of said river, permission, revocable at will by the Secretary of War, is hereby given to The Niagara Falls Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of nineteen thousand, five hundred cubic feet per second, and that this permission shall be subject to further conditions as follows:

1.—That all work and operations of said permittee for the diversion of water, or for the operation of, or changes in, its plant and accessories, and for the distribution of power shall be subject to the general supervision and approval of such division engineer or district engineer of the Engineer Department at Large as the Secretary of War may designate by written notice to the said Company.

2.—That the permittee shall make, under the supervision of an inspector authorized in writing by the said engineer, measurements in its intake canals of such character and at such times as the said engineer may deem necessary to show the quantity of water diverted.

3. That the permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to whom water power or mechanical horse power is furnished.

4.—That the power stations of the permittee and of the consumers to whom water power or mechanical horse
1251 power is furnished, together with their operation records, shall be subject to inspection at all times by inspectors authorized in writing by the said engineer.

5.—That all expenses of inspection shall be paid by the permittee in cases when collection from the permittee is approved by the Chief of Engineers, United States Army.

6.—That the permittee shall promptly furnish the said engineer upon written notice from him, such information as he may specify concerning amount of power generated and delivered, to whom delivered, limits of variation in delivery, costs, and selling prices, and also conditions concerning sluicing of ice or trash, or other operations involving the by-passing or wasting of water.

7.—That the Secretary of War reserves the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the said Joint Resolution.

WITNESS my hand this 30th day of July, 1919.

(Signed) NEWTON D. BAKER,
Secretary of War.

Applicant's Exhibit 20.

1252 *Extract From*

DIVERSION OF WATER FROM THE GREAT LAKES AND NIAGARA RIVER

LETTER FROM
THE SECRETARY OF WAR
TRANSMITTING

With a Letter from the Chief of Engineers, Reports by Col. J. G. Warren, Corps of Engineers, and the Board of Engineers for Rivers and Harbors, of an investigation authorized by Public Resolution No. 8, Sixty-Fifth Congress,

BLEED THROUGH-

of the subject of water diversion from the Great Lakes and the Niagara River, including navigation, sanitary, and power purposes, and the preservation of the scenic beauty of Niagara Falls and the Rapids of Niagara River.

[*Transmitted to the Speaker of the House of Representatives, December 7, 1920.*]

(Extract from page 299)

"*Pettebone-Cataract Paper Co.*—The Pettebone-Cataract Paper Co. is the only other company that still retains a right to take water from the Hydraulic Canal. It has succeeded to the right mentioned previously to draw from the basin an amount of water 'equal to 900 horsepower, under a head of 50 feet.' This was a perpetual right granted to C. B. Gaskill 'and to his heirs and assigns forever.' By an arbitration in 1884 it was decided that the amount described in the deed was equivalent to 189.2 cubic feet per second. In addition, this company has leased from the Hydraulic Power Co. the right to a small additional diversion. The quantity now supposedly used by the Pettebone Co. is 219 cubic feet per second, and by the Cataract City Milling Co. 52 cubic feet per second. The more northerly of the two covered flumes leads to the water wheel of the Pettebone-Cataract Paper Co., which operates under 90 feet of head. Served by the other flume is a second wheel of the same company, and the wheel of the Cataract City Milling Co., each acting under 86 feet of head. It is improbable that these wheels develop more than 7½ horsepower per cubic feet per second which corresponds to an over-all efficiency of 30 per cent. Photograph No. 144 shows the discharge from the wheels of this company, high up the gorge, and gives a good idea of the wasteful use of water in which this company persists."

* * * * * * * * *

Applicant's Exhibit 21.

Extracts from Opinion No. 77 and Orders.

1281 Exception No. 14—Flour mill purchase account.....$650,000.00

Licensee's Account 397, Undistributed Fixed Capital, included on license date a charge of $650,000 representing the principal amount of bonds given by The Niagara Falls Hydraulic Power & Manufacturing Company (predecessor of Hydraulic Power Company of Niagara Falls) in purchasing certain mill buildings, real estate and water rights in 1900. The record shows, without dispute, that the buildings were used for non-project purposes and do not represent electric fixed capital. Licensee's witness testified, however, that the lands on which the buildings stood were acquired for the project, but Licensee failed to introduce any evidence upon which we can determine the portion of this item to be allowed. Since Licensee has thus failed to support its burden of proof, we would be justified in disallowing this item in its entirety. But to insure that we allow every dollar which has been actually invested in this project, we will reserve this item for future determination along with the land items suspended by Exception No. 9.

* * * * * * * * *

1301 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

COMMISSIONERS: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

June 9, 1942

In the Matter of The Niagara Falls Power Company
Project No. 16

ORDER DETERMINING ACTUAL LEGITIMATE ORIGINAL COST AND PRESCRIBING ACCOUNTING THEREFOR

Upon consideration of the matters of record with respect to the actual legitimate original cost of and net invest-

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ment in Project No. 16, The Niagara Falls Power Company, Licensee, as of March 2, 1921, and having on this date made and entered its opinion in this matter, which is hereby referred to and made a part hereof by reference;

The Commission *finds* and *determines* that:

* * * * * * * * *

(2) The record of this proceeding is inadequate for disposition of the items of interest during construction, land and flour mill purchase account, listed in column (4) under the heading "Reserved for further consideration" in said tabulation; and said amounts, totalling $3,985,-500.14, are reserved for future investigation and disposition by the Commission;

* * * * * * * * *

1303 EXHIBIT "A"

Exception No.		Book Cost of Fixed Capital in Service on March 2, 1921	Reserved for Further Consideration
* * * * * * * * *			
14	Flour Mill Purchase Acc.	650,000.00	650,000.00
* * * * * * * * *			

1304 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

COMMISSIONERS: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Nelson Lee Smith.

December 28, 1943

In the Matter of The Niagara Falls Power Company
Project No. 16

ORDER SUPPLEMENTAL TO ORDER OF JUNE 9, 1942, DETERMINING ACTUAL LEGITIMATE ORIGINAL COST AND PRESCRIBING ACCOUNTING THEREFOR.

It appearing to the Commission that:

* * * * * * * * *

1305 The Commission, upon consideration of the proceedings heretofore had and the matters of record, including the aforesaid stipulation, *finds* and *determines* that:

* * * * * * * * *

1306 (3) The amount of $650,000 (suspended by exception No. 14, flour mill purchase account) represents the cost of land and is part of the actual legitimate original cost of project No. 16 as of March 2, 1921, and is allowed;

* * * * * * * * *

Staff's Exhibit A.

1309 Federal Power Commission,
Washington, D. C.

Sirs:—

The Niagara Falls Power Company, a corporation of the State of New York, hereby files this written objection to the issuance by your Commission to any other person, firm or corporation than said The Niagara Falls Power Company of any preliminary permit or license in respect to the use of any of the waters of the Niagara River for power purposes, which may interfere with or affect, physically or otherwise, the use by The Niagara Falls Power Company of the waters of said river above the Falls to the extent that said waters are now actually and lawfully diverted by it for power purposes, being approximately a daily diversion at the rate of 20,000 cubic feet per second.

The Niagara Falls Power Company has the legal proprietary right to the use of the waters of the Niagara River above the Falls for power purposes, amounting in the aggregate to a daily diversion at the rate of at least 20,000 cubic feet of water per second, as more fully and at large appears by reference to its final application filed with the Federal Power Commission, and by the evidence therein contained, and will further appear by evidence to be pro-

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duced before this Commission on any hearing to be had in respect of the subject matter.

The Niagara Falls Power Company further ob-
1310 jects to the issuance by your Commission of any preliminary permit or license in respect to any project requiring the diversion of water from the Niagara River below the Falls of Niagara, insofar as any such project may affect, physically or otherwise, the authorized works of said The Niagara Falls Power Company.

The Niagara Falls Power Company further objects to the issuance of any preliminary permit or license in respect of any project which may affect or interfere physically or otherwise with the use by said The Niagara Falls Power Company for power purposes of waters of the Niagara River to the extent of 20,000 c.f.p.s. diverted or to be diverted from above the Falls of Niagara, as permitted by the existing treaty with Great Britain, on the further ground that no other person or corporation has any lawful authority under the laws of the State of New York or is qualified under the Federal Water Power Act to use or divert such waters for power purposes, or to apply for a preliminary permit or license therefor.

Dated, January 24, 1921.

THE NIAGARA FALLS POWER COMPANY,
By: PAUL A. SCHOELLKOPF,
President.

MORRIS COHN, JR.
Counsel.

* * * * * * * * *

Staff's Exhibit B.

1311 SIXTEENTH MEETING [OF FEDERAL POWER COMMISSION] HELD IN ROOM 6127, INTERIOR DEPARTMENT BUILDING, FEBRUARY 28, 1921.

* * * * * * * * *

1312 The executive secretary submitted the opinion of the chief counsel (L. Decisions, Niagara River), dat-

ed February 25, 1921, on the question of the authority of the Commission to issue preliminary permits for the diversion of water from the Niagara River above the falls
1313 in excess of the amount authorized to be diverted by article 5 of the treaty with Great Britain, promulgated May 13, 1910, establishing the International Joint Commission. The chief counsel holds that the Federal Power Commission is without authority, so long as the said treaty is in force, to issue preliminary permits for the diversion of water from the Niagara River above the falls in excess of the amount authorized by the treaty. No action was taken upon this opinion by the Commission by way either of approval or of disapproval.

* * * * * * * * *

The executive secretary presented a memorandum of facts with respect to the several applications before the Commission involving the use of water from the Niagara River and made certain recommendations for action thereon. After discussion and after giving consideration to statements made by Mr. Charles E. Dickinson, president of the Hydraulic Race Co., and Mr. M. C. Spratt, representing the Niagara Gorge Power Co., the Commission took action as follows:

In the matter of the application of the Hydraulic Race Co. (project No. 15) for a license to divert from the Niagara River 1,000 cubic feet of water per second for use for power purposes at or near the city of Lockport, in the county of Niagara, State of New York, and reuse at other points along Eighteen-mile Creek and Old Orchard Creek, either or both, in the counties of Niagara and Orleans, State of New York, upon full consideration of the matter the Commission not being satisfied that the plans submitted by the applicant would use the water under efficiency approximating that which can be obtained by its use at Niagara Falls, voted to deny the application for a license but to grant a preliminary permit expiring March 1, 1922, for a

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project involving the diversion and use of water from the Niagara River through the Barge Canal, as specified above, in quantity not exceeding a daily diversion of 300 cubic feet of water per second, subject to the condition that the permittee shall submit, prior to the expiration of the permit plans, specifications and estimates for using the 500 cubic feet per second of water in such manner as to obtain therefrom an aggregate development of not less than 25 horsepower per cubic foot per second, together with all data necessary for determining whether and under what conditions a license, if approved, shall be granted, and subject to any other conditions required by the regulations.

1314 In the matter of the application of the Niagara Falls Power Co. (project No. 16), it was voted to approve the application for the use of 19,500 c.f.s. in the manner set forth in the "main or principal application" of the company as described in its application of January 3, 1921, and exhibits accompanying the same filed with the Commission on January 11, 1921, and to issue license to the applicant subject to the provisions of the act, to the rules and regulations of the Commission as adopted, and to certain special conditions recommended by the executive secretary, as follows:

1. That the fair value of the completed parts of the project as of the date of license be determined as early as practicable in the manner prescribed by the act.

2. That in view of the proposed method of using the water authorized to be diverted under license, the treaty limitations in respect thereto, and the possibility of a total or partial abandonment of the two stations of the Niagara plant and of station No. 2 of the hydraulic plant, the licensee, during the period of license, provide for the elimination of the entire net investment in the plants to be abandoned.

3. That the license provide that, in the event the United States takes over the properties of the licensee at the end

of the license period, or transfers them to a new licensee, the licensee shall be saved harmless with respect to any obligation or liability thereafter under certain existing contracts extending beyond the period of the license, and that the license specifically provide that it should not be construed as a recognition by the Commission of the validity of any such contracts or as an impairment of the rights of the United States or of the State of New York to revise such contracts or to regulate rates thereunder.

4. That the license period be 50 years from the date of execution thereof.

In the matter of the application of the Lower Niagara River Power & Water Supply Co. (project No. 24) it was voted to issue a preliminary permit for a period of two years for the purpose of preparing and submitting to the Commission plans for the diversion and use of 19,500 c.f.s. such permit to be issued subject to the provisions of the act, to the rules and regulations of the Commission as adopted, and to the following special conditions recommended by the executive secretary:

1. That all investigation work, excavation, or dumping in the Niagara River be subject to the inspection and approval of the Engineer officer of the United States Army in charge of the locality, and that the operations of the permittee be conducted in such manner as not unreasonably to mar the scenic grandeur of the Gorge of the Niagara River.

2. That the project works be so designed as to make full economic use of the head available between the level of the Maid of the Mist Pool and of the river at or near the foot of the rapids, and that the permittee take such steps as may be necessary to secure any additional State authority required for such purpose.

3. That the issuance of license be conditioned upon the approval of the International Joint Commission.

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4. That if license be issued it be for a period of 50 years subject to the rules and regulations in force at the date of issuance of permit.

It was voted that the following applications for permits or licenses involving the use of the waters of the Niagara River be rejected:

1. Project No. 6, Niagara Power & Development Co.

2. Project No. 14, Western New York Utilities Co.

3. Project No. 25, Niagara, Lockport & Ontario Power Co.

4. Project No. 26, City of Buffalo.

1315 5. Project No. 37, J. Kennard Thomson and Peter A. Porter.

6. Project No. 39, Millard F. Bowen.

7. Project No. 45, The Niagara Gorge Power Co.

It was moved by the chairman that the minutes of the Commission contain an expression by the Commission, based on its thorough consideration of the matter, that any additional diversions of water on the American side of the Niagara River, which may be authorized in the future under any treaty amendment, should be used only in an "over-the-top" development so designed and located as to make full use in a single stage of the entire head economically available. The motion was seconded by Secretary Meredith, put by Secretary Payne, and adopted by unanimous vote of the Commission.

Excerpts from Item D by Reference [Project No. 16 License and Amendments Thereof]

1397 THE NIAGARA FALLS POWER COMPANY
WATER POWER LICENSE, PROJECT NO. 16.

Whereas by the Federal Water Power Act (hereinafter called the "Act") approved June 10, 1920, (41 Stat. 1063) authority to issue licenses for the purpose of constructing, operating and maintaining water conduits, power houses, transmission lines or other project works and for the development, transmission and utilization of power across, along, from, or in any of the navigable waters of the United States is vested in the Federal Power Commission (hereinafter called the "Commission"); and

Whereas application has been made to the Commission in due and proper form by The Niagara Falls Power Company (a corporation organized and existing under the laws of the State of New York and having its office and principal place of business in the city of Niagara Falls, New York) for a license to develop power from the waters of the Niagara River by the diversion of the waters of said river for that purpose through the project of applicant already constructed and through project works to be constructed in the City of Niagara Falls, Counties of Niagara and Erie, and State of New York, as described in said
1398 application, in respect of which project so far as already constructed said applicant had on the 10th day of June, 1920, a permit, right-of-way and authority, and, which said project is more fully described and located by the application dated January 3, 1921, and exhibits accompanying the same filed with the Commission on January 11, 1921 and designated as Project No. 16, in the records of the Commission; and

Whereas notice of such application has been duly given and published by the Commission as required by Section 4 of the Act; and hearings have been held by the Commission after full opportunity given to all interested parties to be heard; and

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Whereas no plans adapted to conserve and utilize in the public interest the navigation and water resources of the region have been filed by the State of New York or by any municipality thereof; and

Whereas the Commission finds that said project, as shown by the maps, plans and description thereof will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water power development and of other beneficial public uses and to develop, conserve and utilize in the public interest the navigation and water resources of the region and is satisfied as to the ability of the applicant to carry out its plans in respect to said project; and

Whereas the plans for said project and structures thereof affecting navigation have been submitted to and so far as they affect the navigable capacity of any navigable water of the United States have been approved by the Chief of Engineers and the Secretary of War; and

1399 Whereas satisfactory evidence has been submitted to the Commission, as required by Section 9, subdivision (b) of said Act, that the applicant has complied with the laws of the State of New York; and is legally entitled to proceed with the further construction and the maintenance and operation of said project when licensed by the Commission.

Now, therefore, the Commission hereby licenses The Niagara Falls Power Company (hereinafter called "licensee") to construct, operate and maintain diversion structures, water conduits, power houses, transmission lines, and other project works, and to develop, transmit and utilize power from the waters of the Niagara River as described in its said main or principal application (excluding the supplements or alternatives filed therewith) upon the following terms namely:

1. The licensee is authorized and permitted for and during a term of fifty years from the date hereof to divert, within the State of New York, from the waters of said Niagara River, above the Falls of Niagara, for power purposes, water not exceeding in the aggregate a daily diversion at the rate of 19,500 cubic feet per second, provided that the maximum diversion in any calendar day shall not exceed said rate by more than twenty per cent thereof; and the licensee is also authorized and permitted to dredge, excavate and construct channels in said river and to construct said project in accordance with the proposals of said application as follows:

* * * * * * * * *

1406 PROPOSED STATION NO. 2 EXTENSION
(being built)

Forebay.

Located about 100 feet below surface of ground near edge of cliff under the Cataract City Milling and Pettebone-Cataract Paper Company.

Consisting of excavated chamber in solid rock, together with concrete lining, weirs, gates and appurtenances.

NOTE: The water 262.6 c.f.s. will be discharged into this forebay from the tailrace of the Cataract City Milling Company and the Pettebone-Cataract Paper Company.

(See Exhibit "F", sheets #3 and #11.)

Tunnel.

Located about 100 feet below the surface of ground near the edge of cliff. Carries water from Station No. 2 Extension forebay to penstock #1 of Station No. 2.

Consists of excavation in solid rock together with concrete lining, regulating weir and appurtenances.

(See Exhibit "F", sheets #3 and #11.)

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Penstock.

Located under the cliff leading from above tunnel into north end of Station No. 2.

Consists of 8 foot diameter steel plate penstock, supports, valves and appurtenances.

(See Exhibit "F", sheets #3 and #11.)

* * * * * * * * *

1411 HYDRAULIC PLANT

Power House for Station No. 2 Extension.

The north end of existing Station No. 2 Power House will be used for this generating unit marked "A" until the construction of unit #24 of Station No. 3 Extension, when it will be moved to a point north of unit #21 in Station No. 3 Extension.

(See Exhibit "D", sheet #2.)
(See Exhibit "F", sheets #3 and #11)

* * * * * * * * *

1416 2. The terms and conditions of the Act, the rules and regulations of the Commission pursuant thereto, in force on the date of this license, and all other statutes pertaining to the subject matter in so far as applicable, are hereby made a part of this license as though fully set out herein.

3. The main or principal application of the licensee, dated January 3, 1921, and the exhibits accompanying the same, as hereinbefore described, are hereby made a part of this license; and the proposed project works, alterations and improvements shall be constructed in accordance therewith. No change sl ll be made in said maps or plans until such changes have been approved by the Commission. After the project is fully completed the licensee shall file with the Commission such amended maps as may be necessary to show any changes from the original maps and plans, or to indicate the exact project boundary.

* * * * * * * * *

1418 7. The water to be diverted by the licensee may b
utilized in its power stations heretofore built in th
City of Niagara Falls, New York, until the licensee shal
construct its "Proposed Addition to Station No. 3 Exten
sion Hydraulic Plant" and as soon as a new unit or unit
of its said "Proposed Addition to Station No. 3 Extensio
Hydraulic Plant" shall be installed and ready for opera
tion, the licensee shall utilize the water so authorized t
be diverted by it, in the operation of its plants in suc
manner as shall produce the best results, it being intende
after the completion of "Proposed Addition to Station No
3 Extension Hydraulic Plant" that the existing Niagar
plant shall be maintained and operated as a reserve, emer
gency, or peak load plant, or be operated with an
1419 increased diversion which the licensee may hereafte
be legally authorized and entitled to divert fro
the Niagara River for power development.

* * * * * * * * *

1423 13. In the event that the United States or a ne
licensee shall take over the project of the license
pursuant to the provisions of the Act, . . .

* * * * * * * * *

1424 Such taking over of the project shall also be sub
ject to the rights, if any, of Pettebone-Cataract Pa
per Company and Cataract City Milling Company to with
draw water at a rate not exceeding 265 cubic feet per se
ond from the Hydraulic canal or basin of licensee, and t
the rights, if any, of International Paper Company.

* * * * * * * * *

1425 14. This license is for a term of fifty (50) year
from its date of issuance; and is conditioned upo
acceptance by the licensee within thirty days of all th
terms and conditions of the Act and of this license.

* * * * * * * * * *

BLEED THROUGH-

Minutes of Meeting Held on March 27, 1922, Authorizing Amendment No. 1.

1466 "In the matter of the application of the Niagara Falls Power Company of Niagara Falls, New York, for amendment of the license issued to that Company by the Federal Power Commission, March 3, 1921, by the substitution of three hydro-electric units, each of about 70,000 horsepower capacity, and one forebay, for five units, each of about 37,500 horsepower capacity, and two forebays, as indicated on the original plans, the one forebay to be on the easterly side of the hydraulic basin; it appearing to the Commission that the proposed changes in plans are changes in detail only and will not involve any substantial alteration or addition to the general plan of development, that they will not involve any change in the amount of water to be diverted from the river above the Falls, and that their effect will be to simplify the operation of the project plant and ultimately result in an increased economy more than justifying the additional cost; it was voted by the Commission that it finds that in view of the character of the changes no advertisement of the proposed amendment of the license is required by the Federal Water Power Act, and that an instrument be issued amending the license by the substitution of the exhibits showing the amendments herein authorized for the corresponding exhibits of the original license; and authorizing the substitution for the six circuits of the Riverside Avenue Transmission Line from Hydraulic Plant, Station No. 3 Extension to Echota Substation, of the number of circuits of such size and material as may be necessary economically and efficiently to transmit power from said Hydraulic Plant to said Echota Substation."

* * * * * * * * * *

Extract from Amendment No. 1 to Project No. 16 License, issued April 7, 1922.

* * * * * * * * * * *

1468 Now, THEREFORE, the Commission hereby amends said license by the substitution of the exhibits show-

ing the proposed changes for the corresponding exhibits of the original license, as more fully set out below:

* * * * * * * * *

Exhibit F, Sheet 3-A, Hydraulic Plant, Plant Sta. No. 2 & No. 3 Extension—Existing and Proposed, filed February 25, 1922, and signed by Paul A. Schoellkopf, President, and John L. Harper, Chief Engineer, *To supersede* Exhibit "F", Sheet "3", Hydraulic Plant, Plan Station No. 2 and Station No. 3 Extension—Existing and Proposed, signed by Paul A. Schoellkopf, President, and John L. Harper, Chief Engineer, and approved by the Federal Power Commission on March 1, 1921.

* * * * * * * * *

BLEED THROUGH-

Item Officially Noticed,
Federal Power Commission Opinion No. 159, Issued November 17, 1947, and Order of November 17, 1947.

(6 F. P. C. 184-189)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION No. 159

In the Matter of
THE NIAGARA FALLS POWER COMPANY
Project No. 16

BY THE COMMISSION:

On February 17, 1947, The Niagara Falls Power Company, which operates a hydroelectric power project at Niagara Falls, New York, by virtue of a license issued March 2, 1921, under the Federal Water Power Act, now a part of the Federal Power Act, filed an application, which it supplemented on March 20, 1947, for amendment of paragraph 13 of its license. The license, among other things, authorizes the Company to divert daily for a period of 50 years 19,725 cubic feet per second (c.f.s.) from the Niagara River for power purposes.*

In accordance with the Act, the license provides for possible acquisition of project property by the United States at the end of the license period. In this connection, paragraph 13 of the license states in part:

> Such taking over of the project shall also be subject *to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per*

* The original license authorized a diversion of 19,500 c.f.s., a subsequent amendment bringing the diversion to 19,725. Other amendments to the license authorize emergency diversions of 12,500 c.f.s. and a temporary authorization permits an additional diversion of 275 c.f.s., but these have no bearing on the instant proceeding.

> *second from the Hydraulic Canal or Basin of Licensee, and* to the rights, if any, of International Paper Company. (underscoring supplied)

The 265 cubic feet per second referred to in paragraph 13 are a part of the 19,725 c.f.s. which the Niagara Falls Power Company is authorized to divert from the Niagara River. The licensee seeks to eliminate from paragraph 13 of the license the language underscored above. In explanation of the application, the licensee on March 20, 1947, filed an amendment in which it stated:

> It is the purpose of our requested amendment of license for project No. 16, and we hereby so apply, to have the license amendment include in the project the so-called Pettebone-Cataract water rights which are to be acquired from Buffalo Niagara Electric Corporation.

Hence, approval by the Commission of the proposed change would be construed as an implied approval of the claim that the so-called water rights are in existence, are valuable, and can be purchased.

In other words, while the form of the petition relates only to amendment of the license by striking out one of the provisions thereof, the substance of the petition relates to contemplated acquisition of so-called water rights which are claimed to be very valuable. Accordingly, we shall direct our attention to the substance rather than to the form of the petition.

The alleged water rights purport to convey the right to take and withdraw from the Hydraulic Basin of the licensee and to use 262.6 cubic feet per second of water through a head not exceeding 100 feet. They were said to have originally attached under State law to certain parcels of land owned by Pettebone-Cataract Paper Company and Cataract City Milling Company. Both the lands and other properties and the alleged water rights were purchased in 1925 by Niagara, Lockport and Ontario Power Company,

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an affiliate of licensee. The day after the purchase, Niagara, Lockport and Ontario, by an agreement dated May 1, 1925, sold the land and other physical property to the licensee but expressly reserved to itself title to the water rights in question. Buffalo Niagara Electric Corporation is the successor to Niagara, Lockport and Ontario, and is also an affiliate of Niagara Falls Power Company. The Niagara Falls Power Company, licensee, proposes to acquire the alleged water rights from Buffalo Niagara Electric Corporation for a cash consideration of $728,415.45, which is said to be the cost incurred by Niagara, Lockport and Ontario. Buffalo Niagara holds no authority from the United States for the diversion or use of any water at Niagara Falls.

Niagara River is a navigable water of the United States and an international boundary stream. In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66. It is useless to contend that the water can be subject to private ownership after diversion, but before use by The Niagara Falls Power Company for power purposes, because the water under the license can be diverted only for power purposes of the licensee and for no other purpose. The licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law.

As previously noted, it is contended that the purported water rights are founded on State law which, in this instance, is said to be superior to federal authority over the stream. Not only is this contention at variance with the recognition in the *Chandler-Dunbar* case, *supra*, of the limitations of State rights, but it is at variance with similar holdings in cases dealing with the Federal Power Act.

The license issued for Project No. 16 on March 2, 1921, purported, under the provisions of Section 23 of the Act, to allow the licensee the fair value of its property as of that date upon the assumption that the company then held some continuing right to the diversion and use of water from the Niagara River. If it did not have such a right it was entitled only to a license providing that the net investment should be based upon the actual legitimate original cost of the project. In 1942 after extended review of the contentions, the Commission held the company was not entitled to a fair value license, because, it said, the licensee in 1921 actually had no valid outstanding federal authority to divert water from the Niagara River and its State rights were not sufficient. In sustaining the Commission's disallowance of fair value the United States Court of Appeals for the Second Circuit on July 29, 1943, referred to the allotment of water permitted under the treaty of 1910 and said:

> When Congress set up the Commission with power to issue licenses for the "utilization of power * * * from * * * any of the navigable waters of the United States" (Sec. 4(d) of the Act of June 10, 1920) the Commission was vested with the distribution of this allotment and any rights acquired from the State of New York necessarily yielded to what it might do.
>
> (*Niagara Falls Power Company* v. *Federal Power Commission,* 137 F 2d 787, 791; cert. denied by United States Supreme Court 320 U. S. 792; rehearing denied 320 U. S. 815.)

Again, the Supreme Court said that where the Federal Government supersedes the State government, there is no suggestion in the Federal Power Act that the two agencies both shall have final authority. In fact, the Court said several sections of the Act indicate a contrary policy. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 168.

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Some point was made by the licensee that the alleged water rights attached to the water after it is diverted from the Niagara River, over which the United States admittedly has control, and after it is conveyed to the Hydraulic Basin of the project where it becomes subject to private ownership under State law. This is to suggest that while the United States may control the actual diversion of water from the Niagara River, it has no authority to control the use of the water so diverted because after diversion under federal authority the water becomes subject to State or private control even if used contrary to the federal authorization.

This argument disregards the nature of the permission given by the United States to make any diversion of this navigable stream. Under the terms of the license the licensee is authorized to divert and use water from the Niagara River for power purposes solely through Project No. 16 where a head of approximately 210 feet is provided, or twice the head formerly utilized by the paper and milling companies. The licensee is not authorized to divert water to sell to any other user or power developer or to supply from its diversion canal water claimed under any so-called State right. We do not regard the authority of the United States as being limited in the manner suggested by the licensee, nor do we recognize that the licensee would comply with the terms of the license if it did not use all of the diverted water through the facilities authorized as composing Project No. 16.

It follows that the above-quoted provisions of paragraph 13 of the license are of no legal significance or effect because the diversion and use of the water authorized by the license can be subject to no superior private rights and the license should not be amended to include the alleged rights as requested. Accordingly, while we would be agreeable to the elimination of the language requested merely as a means of clearing up the license instrument, we cannot consent to the elimination of a part of paragraph 13 leaving

an amended paragraph which might be construed as recognizing other alleged water rights claimed by another company.

Upon the record before us, we are of the opinion that the application for license amendment should be denied. An order will be entered.

NELSON LEE SMITH,
Chairman
CLAUDE L. DRAPER,
Commissioner
LELAND OLDS,
Commissioner
HARRINGTON WIMBERLY,
Commissioner

Dated at Washington, D. C.,
this 17th day of November, 1947.
LEON M. FUQUAY,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds and Harrington Wimberly.

November 17, 1947.

In the Matter of
THE NIAGARA FALLS POWER COMPANY
Project No. 16

Order Denying Application for Amendment of License

(1) Upon application filed February 17, 1947, as supplemented March 20, 1947, by The Niagara Falls Power Company, licensee for Project No. 16 for amendment of

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the license issued March 2, 1921, under the statute now known as the Federal Power Act, for elimination from Paragraph 13 of the license of a reference to certain water rights then claimed to be held by Pettebone-Cataract Paper Company and Cataract City Milling Company;

(2) Upon the facts found and for the reasons set forth in Opinion No. 159, which is hereby incorporated by reference and made a part hereof, it is *ordered* that:

(3) The application for amendment of Paragraph 13 of the license for Project No. 16 referred to above is hereby denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: November 21, 1947

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Appeal from Order of the Federal Power Commission.

SUPPLEMENTAL APPENDIX.

EXTRACT FROM FEDERAL POWER ACT.

Section 10(d), 16 USC 803(d):

"SEC. 10. All licenses issued under this Part shall be on the following conditions:

". . .

"(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon

the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license."

EXTRACTS FROM NEW YORK STATUTES RELATING TO THE NIAGARA FALLS POWER COMPANY AND ITS CORPORATE PREDECESSORS, AND DIVERSIONS OF WATER FROM THE NIAGARA RIVER BY SAID CORPORATIONS.

New York Laws 1886.

CHAPTER 83.

An Act to Incorporate the Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls, New York.

Passed March 31, 1886; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Myron H. Kinsley, Charles B. Gaskill, Thomas V. Welch, Henry S. Ware, Thomas Evershed, Michael Ryan, W. Caryl Ely, James Frazer Gluck and all such persons as are or may hereafter be associated with them, are constituted a body corporate and politic by the name and style of the "Niagara River Hydraulic Tunnel, Power and Sewer Company of Niagara Falls, New York," for the purpose of constructing, maintaining and operating, in connection with the Niagara river, an hydraulic tunnel or subterranean sewer, for the public use of sewerage and

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drainage as hereinafter specified, and for furnishing hydraulic power for manufacturing purposes in the town of Niagara in the county of Niagara.

2. This corporation shall have power to construct, maintain and operate its said tunnel or sewer through and under the streets, avenues and highways of the village of Niagara Falls and such other villages as may be situated along the line of said tunnel or sewer by obtaining the consent of the local authorities of such village or villages, subject to such reasonable regulations as the said local authorities may prescribe; provided, however, that the said corporation shall permit the said village or villages to use the said tunnel or sewer for the purpose of draining or sewering said village or villages at such reasonable rates and upon such conditions as may be agreed upon by said corporation and said local authorities; and provided further, that the power herein granted shall not in any sense be construed as permission to cross, intersect or infringe upon any part of the lands of the State reservation at Niagara.

* * * * * * * * * *

10. The said company may acquire title to land for the purpose hereinbefore specified, in the same manner specified and required in and by the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, and the acts amendatory thereof and supplemental thereto, so far as the same are applicable, and may construct, operate and maintain its said tunnel, conduits or sewers for the purposes of said company, as here before specified, or under the waters of the Niagara river, provided they are so laid as not to interfere with the navigation of the same.

11. Said company shall possess the general powers and privileges and be subject to the liabilities and restrictions contained in title third, chapter eighteen of the first part of the Revised Statutes, and the provisions of section six,

article first, title two, chapter thirteen of the first part of the Revised Statutes shall apply to the same.

* * * * * * * * * * *

15. The corporate existence of said company be fifty years.

16. This act shall take effect immediately.

New York Laws 1889.

CHAPTER 109.

An Act to amend chapter eighty-three of the laws of one thousand eight hundred and eighty-six, entitled "An Act to incorporate the Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls, New York."

Approved by the Governor April 5, 1889. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter eighty-three of the laws of one thousand eight hundred and eighty-six, entitled "An act to incorporate the Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls, New York," is hereby amended so as to read as follows:

1. Myron H. Kinsely, Charles B. Gaskill, Thomas V. Welch, Henry S. Ware, Thomas Evershed, Michael Ryan, W. Caryl Ely, James Fraser Gluck, their associates and assigns, are and shall continue to be a body corporate and politic by the name and style of the "Niagara River Hydraulic Tunnel, Power and Sewer Company of Niagara Falls, New York," for all the purposes hereinafter specified.

2. Section two of said chapter, is hereby amended so as to read as follows:

2. Said corporation shall have power to construct, maintain and operate a tunnel, conduit or sewer or tunnels,

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conduits or sewers in, through and under the town of Niagara, the village of Niagara Falls or the streets, avenues or highways thereof, and such other villages in the town of Niagara, as may be situated along the line of any such tunnel, conduit or sewer, by obtaining the consent of the local authorities of such town, and of such village or villages, subject to such reasonable regulations as such local authorities may prescribe; provided, however, that the said corporation shall permit the said village or villages to use the said tunnel or sewer for the purpose of draining or sewering said village or villages at such reasonable rates and upon such conditions as may be agreed upon by said corporation and said local authorities; and provided further, that the power herein granted shall not in any sense be construed as permission to cross, intersect or infringe upon any part of the lands of the State Reservation, at Niagara. Said corporation shall also have power to hold, lease and convey lands or other property for the purposes of its business, and either upon such lands or elsewhere to accumulate, conduct, store, sell, lease, furnish, operate and supply the waters of the Niagara river taken from some points on the east shore thereof, at such points between the east line of lot forty-six, Mile Reserve (so called) and Port Day (so called) as may be most convenient, or the power to be developed from the flow of such water for fire, sanitary, municipal, domestic, manufacturing, agricultural, electrical or power purposes, and also shall have power by such hydraulic or electrical conductors, or other devices as shall be permitted by the common council of any city, the trustees of any village, or the highway commissioners of any town in or through which such conductors or other devices shall be constructed, operated or maintained, to conduct, convey and furnish such power to, through or in any town, village or city in the counties of Niagara and Erie.

* * * * * * * * * * *

4. This act shall take effect immediately.

New York Laws 1891.

Chapter 253.

An Act concerning the Niagara Falls Power Company, and to amend chapter eighty-three of the laws of eighteen hundred and eighty-six, as amended by chapter one hundred and nine of the laws of eighteen hundred and eighty-nine.

Approved by the Governor April 23, 1891. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * * * * *

4. Section ten of said chapter eighty-three of the laws of eighteen hundred and eighty-six, is hereby amended so as to read as follows:

10. The said company may acquire title to land for the purposes herein specified in the manner specified by the condemnation law of this state, and may construct, operate and maintain its tunnels, conduits, sewers and its hydraulic, pneumatic or electrical conductors for the purposes of said company as hereinbefore specified, or in accordance with the consents given by the local authorities of the towns of Niagara, Wheatfield and Tonawanda and the villages of Niagara Falls, Tonawanda and North Tonawanda, the consents already given by such local authorities being hereby confirmed, or under the waters of the Niagara river, provided that they shall be so laid as not to interfere with the navigation thereof.

* * * * * * * * * *

8. Said company is authorized and empowered to use and supply to any of the cities, towns or villages in the counties of Niagara and Erie, or the inhabitants thereof, pure and wholesome water and power or electricity for the purposes aforesaid, or any thereof in such way or manner and at such reasonable rates and cost and on such condi-

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tions to consumers or users as may be deemed advisable and agreed upon, and any city, town or village aforesaid, by its authorities, may contract with said company for the supplying, delivery and use of pure and wholesome water, power and electricity, or either thereof, for fire, illuminating, sanitary or other public purposes. The amount by any city, town or village aforesaid, agreed to be paid therefor shall be annually raised, levied, assessed and collected in the same manner as other expenses of such city, town or village are or may be raised, and when collected shall be kept separate from other funds of such city, town or village, and be paid over to said company by said authorities according to the terms and conditions of the contract in the special case; provided, however, that no such contract shall be made for a longer period than twenty years; and provided that in towns where there shall be an incorporated village, constituting a part only of such town, no tax shall be levied upon property within the village limits for the purposes of this act, except in pursuance of a contract between the authorities of such village and said company.

9. Said company may prevent the flow or drainage of noxious or impure waters or matters from the lands of others into any canal, raceway, reservoir or other work of said company, and may alter, straighten, deepen, obstruct or increase the flow of water in streams or water channels, intersecting or connecting with, or contiguous to its works, or any thereof; and may discharge water at such point or points, and in such quantity and manner as may be most convenient and advantageous, and may build, erect, construct, dig and lay any canals, raceways, ditches, locks, piers, inlet piers, cribs, bulkheads, dams, gates, sluices, reservoirs, aqueducts, conduits, pipes, culverts, posts, abutments, conductors, cables, wires, insulators, or other works, machinery, fixtures, or buildings of every kind and description whatsoever that may be necessary, proper and convenient for its said purposes, or any thereof, upon any lands in which it may acquire a right so to do, or in said

Niagara river, provided that the navigation thereof be not obstructed.

10. Said company may enter upon and use the ground or soil under any street, highway, road, railroad land or public ground except Erie canal land, within said counties for the purposes aforesaid, and may, when necessary, change the location or surface grade of any street, highway or road; and such right shall be continuous for said purposes, including the relaying, repairing, altering or extending its works; provided, however, that in cases where any open canal or other open work of said company, shall cross any street, highway, road, public ground or railroad land, said company shall construct, and at all times thereafter maintain suitable and proper bridges over its said work where such bridges are rendered necessary by the construction of its said works; and in cases where its pipes or other covered work shall be laid under the surface of any road, street, highway, public ground or railroad land the surface thereof shall be made and kept suitable for public travel, and as nearly as may be as it was before said work was done; and in cases of posts and elevated conductors, cables or wires upon and over such road, street, highway, public ground or railroad land, the same shall be so placed and elevated as not to interfere with the ordinary use thereof by the public or railroad company or highway or railroad purposes.

12.* Said company by any of its officers, agents or servants may, for the purposes aforesaid, enter upon and survey any lands. Before beginning condemnation proceedings to acquire any lands, waters, easements or rights therein, or entering upon or using any thereof, except to survey the same, and except such as shall have been acquired by gift, devise or purchase, said company shall cause a survey and map to be made of the lands, waters, easements and rights therein intended to be taken and acquired by condemnation proceedings, by or on which the land, water,

* So in the original.

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easement or right therein of each owner or occupant shall be designated, which map shall be signed by the president and secretary of said company and filed in the Niagara county clerk's office. Said map may be amended by said company as to any parcel or parcels of land at any time before the appointment of commissioners of appraisal in condemnation proceedings to acquire such parcel or parcels, or any easement or right therein, by filing in said county clerk's office a new or further map, signed as aforesaid, together with a notice stating in substance that the map then on file has been amended, as shown said new map, and thereupon the said new map shall have the force and effect of the map so amended, and the map so first filed shall be deemed superseded as to the lands described or affected by said amendment except so far as it relates to proceedings then already had and done. Whenever said company shall deem it necessary to acquire any additional lands, waters, easements or rights therein, it shall, before beginning proceedings to acquire same by condemnation, cause to be made a like survey and map, which shall be authenticated in like manner and filed in said county clerk's office, showing such additional lands, waters, easements or rights therein intended to be taken, and designating the land, water, easement or right therein of each owner or occupant separately as far as may be.

* * * * * * * * * *

14. This act shall take effect immediately.

New York Laws 1892.

CHAPTER 513.

An Act relating to the Niagara Falls Power Company.

Approved by the Governor, May 12, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * * * * * *

2. Said corporation, its successors and assigns, shall have the right to take and use the waters of the Niagara river at the points heretofore authorized, and at any points on or opposite to any riparian land now owned by said corporation, up to and including a part of the lot forty-nine mile reserve, so-called, to the extent required for the proper operation of the authorized works of said corporation during the continuance of such works; this right being granted upon the express condition that its acceptance shall bind said corporation to furnish free of charge electricity for light and also for power, (so soon as said corporation shall begin to furnish electrical power in Niagara Falls,) and also water for use of the state in the state reservation at Niagara and the public buildings thereon, when requested by the commissioners of the state reservations; provided that nothing contained herein or in any of the former acts concerning said corporation shall be so construed as to confer an exclusive right nor any right to infringe upon the state reservation, or to obstruct the navigation of the Niagara river, or to take therefrom more water than shall be sufficient to produce two hundred thousand effective horse power.

3. This act shall take effect immediately.

New York Laws 1893.

CHAPTER 477.

An Act concerning the Niagara Falls Power Company.

Approved by the Governor April 25, 1893. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * * * * * *

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2. The Niagara Falls Power Company, its successors and assigns, is hereby authorized and empowered in any manner not expressly prohibited by law or by lawful local ordinance to conduct, convey and furnish the waters of the Niagara river, but not in excess of the amount heretofore expressly authorized by law, or any power, heat or light developed therefrom, to, in and through any civil division of this State, and to sell, furnish and deliver the same to any and all bodies or persons, public or private wherever situate; and for any such purposes said corporation from time to time may enter upon any private property for which it may obtain such right, or upon any public bridge, or street, highway, road, land or water and may use the ground thereunder; and it may use and occupy any portion of any such street, highway or road or any such public land or water in such manner as shall from time to time be permitted by the local or public authority having control or supervision thereof; subject, however, to all private rights therein including any right to compensation for any such use and occupation.

3. This act shall take effect immediately.

New York Laws 1896.

CHAPTER 968.

An Act confirming and defining certain riparian rights of The Niagara Falls Hydraulic Power and Manufacturing Company.

Became a law May 28, 1896, with the approval of the Governor. Passed by a two-thirds vote.

The People of the State of New York, represented in Senate Assembly, do enact as follows:

Section 1. The right of The Niagara Falls Hydraulic Power and Manufacturing company to take, draw, use and lease and sell to others to use the waters of Niagara river for domestic, municipal, manufacturing, fire and sanitary

purposes, and to develop power therefrom for its own use and to lease and sell to others to use for manufacturing, heating, lighting and other business purposes is hereby recognized, declared and confirmed, and the exercise thereof by said company, its successors and assigns, to take and to draw water from Niagara river for use and disposal to others to use for the purposes above specified, and for the development of power for use and for disposal to others to use, for purposes above mentioned is hereby limited and restricted to such quantity of water as may be drawn by means of the hydraulic canal of said company when enlarged throughout its entire length to a width of one hundred feet and to a depth and slope sufficient to carry at all times a maximum uniform depth of fourteen feet of water, provided that exercise by said company of the rights hereby declared and confirmed shall not impair the practical navigation of Niagara river.

2. This act shall take effect immediately.

New York Laws 1918.

CHAPTER 596.

An Act to authorize the consolidation of Cliff Electrical Distributing Company, the Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls.

Became a law May 10, 1918, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Cliff Electrical Distributing Company, The Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls, each being a corporation organized and existing under and by virtue of the laws of the State of New York, may, notwithstanding the requirements of any other law, consolidate such corporations into a single new corporation in the manner and with the effect specified

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in respect of consolidations in chapter four of the consolidated laws known as the business corporations law. The capital stock of said new corporation so formed may be issued as preferred stock or as common stock or both. The common stock may be issued in shares, but the aggregate par value of all shares either preferred or common, issued with a par value, shall not exceed but may equal the aggregate of the outstanding capital stocks and the surpluses, unimpaired reserves and undivided profits of said corporations so consolidated, as shown by their reports and books. The consolidation of such corporations and the issue of such new stock shall be subject to the approval of the publice service commission of the second district. The shares of capital stock of said new corporation formed by such consolidation may be distributed among the stockholders of said corporations so consolidated in such proportions and so classified as may be provided in the joint agreement of consolidation. Upon the consolidation of such corporations, the public services to be performed and rendered by the consolidated corporation shall be subject to the provisions of the public service commissions law, and be under the supervision and control of the public service commission having jurisdiction in the territory where such services are rendered.

2. This act shall take effect immediately.

New York Laws 1918.

CHAPTER 597.

An Act authorizing any new corporation constituted by the consolidation of Cliff Electrical Distributing Company, The Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls, efficiently to utilize any water by it lawfully diverted from the Niagara River.

Became a law May 10, 1918, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Any new corporation constituted by the consolidation of Cliff Electrical Distributing Company, The Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls, and the successors and assigns of such new corporation, for the purpose of securing an efficiency of not less than nineteen horsepower per cubic foot per second of water diverted, in the use of any waters which such new corporation as successor to the rights heretofore granted to any of such corporations may lawfully divert from the Niagara river for the development of power, may reconstruct, alter, enlarge and improve its works, canals, tunnels and plant, or any part thereof, and may construct new works, canals, tunnels and plant, through which it may utilize any of such waters. To such ends such new corporation may exercise all the powers heretofore or hereafter conferred upon either or all said corporations so consolidated, provided however, that nothing herein contained shall authorize such new corporation to divert from the Niagara river any water in excess of the amount heretofore authorized by the State of New York in respect of the corporations so consolidated. Provided further that if the corporation constituted by such consolidation shall divert from the Niagara river for power purposes more than fifteen thousand one hundred cubic feet per second there shall be reserved to the state the right to charge an equitable rental therefor in such amount and in such manner as shall hereafter be provided by law; and provided further that nothing in this act shall be construed as giving the right to discharge water into the Niagara river at a point more than one thousand feet below the lowest point of discharge into such river by any of the corporations so consolidated as now fixed. Nothing in this act shall be construed to waive or alienate any right now vested in the state as to waters now being diverted by any of such corporations so consolidated, or to compensation for said rights.

2. This act shall take effect immediately.

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STATUTES, REPORTS AND OTHER DOCUMENTS RELATING TO DIVERSIONS OF WATER FROM THE NIAGARA RIVER, AND PERMITS ISSUED TO THE NIAGARA FALLS POWER COMPANY (CONSTITUENT), 1906-1919.

Extracts from Report of the American Members of the International Waterways Commission Regarding the Preservation of Niagara Falls, March 19, 1906 (S. Doc. 242, 59th Congress, 1st Session).

INTERNATIONAL WATERWAYS COMMISSION,
OFFICE OF CHAIRMAN AMERICAN SECTION,
Washington, D. C., March 19, 1906.

SIR: 1. The American members of the International Waterways Commission have the honor to submit for transmittal to Congress this report, in compliance with the following joint resolution approved March 15, 1906:

> RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the members representing the United States upon the International Commission created by section four of the river and harbor act of June thirteenth, nineteen hundred and two, be requested to report to Congress at an early day what action is in their judgment necessary and desirable to prevent the further depletion of water flowing over Niagara Falls; and the said members are also requested and directed to exert, in conjunction with the members of said Commission representing the Dominion of Canada, if practicable, all possible efforts for the preservation of the said Niagara Falls in their natural condition.

2. The surplus waters of Lake Erie are discharged through the Niagara River into Lake Ontario, the mean level of Lake Erie being 572.86 feet and that of Lake On-

tario being 246.61 feet above the sea. Leaving Lake Erie at Buffalo, the river is navigable and flows with a moderate slope to a short distance below Welland River, or Chippewa Creek, about 19 miles, in which distance it has a fall of about 14 feet. The slope here is suddenly increased and the river ceases to be navigable. In the next half mile it has a fall of about 50 feet, forming the rapids above the falls. It is divided by Goat Island into two arms of unequal size, that on the Canadian side carrying about seven times the volume of water carried by that on the American side. At the foot of Goat Island the waters of both arms plunge over a vertical precipice, constituting Niagara Falls proper, that on the Canadian side being usually known as the Horseshoe Fall, and that on the American side as the American Fall. The height of the Horseshoe Fall is about 161 feet, and that of the American Fall 165 feet. Immediately below the falls the river is again navigable for a short distance, and then assumes the character of rapids as far as Lewiston, 7 miles from Lake Ontario, where it again becomes navigable and remains so until it enters the lake.

3. The volume of water flowing varies with the level of Lake Erie, which level is subject to variations of several feet, depending upon the rainfall, barometric pressure, and direction and force of the wind. At the mean level of the lake (elevation 572.86) the volume of discharge is 222,400 cubic feet per second. At a very low stage (elevation 571) the volume is 180,800 ft. (See Annual Report, Chief of Engineers, U. S. Army, for 1900, p. 5361.) For short periods in midwinter, or with prolonged adverse winds, it has sometimes been even less.

4. It is the great volume of water in the falls themselves and in the rapids which makes the place unique. The tremendous display of power in wild turbulence fascinates the mind, and gives to the question of Niagara's preservation a national interest.

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7. The great water power available at Niagara Falls naturally attracted the attention of engineers at an early day, but it was not until it could be transmitted and used in the form of electricity that its development on a large scale became financially practicable. There are now five principal corporations engaged in furnishing or preparing to furnish electricity for commercial purposes, obtained from the water power, two of them located on the American and three on the Canadian side. A brief description of each is here given. A map showing their location is submitted herewith. It is to be remarked that none of the diversions have been sanctioned by the United States Government.

8. I. NIAGARA FALLS HYDRAULIC POWER AND MANUFACTURING COMPANY.—This company was organized in 1877 under the general laws of the State of New York. It purchased a canal which had been constructed before the Civil War leading from Port Day, above the falls, through the City of Niagara Falls, to the edge of the cliff below the falls, where a grist mill had been established. (See map.) The length of this canal was about 4,400 feet, its width 36 feet, and its depth 8 feet. A width of 70 feet and depth of 10 feet had been projected. In 1881 the company established its first station for supplying electricity for lighting, this being the first public distribution for commercial purposes of electricity derived from Niagara Falls. The increasing demand for electricity and the improved methods of transmitting it led to a steady development of the works of this company and to the establishment of others. In 1895 an important enlargement of the canal having been begun, the right of the company to take water from the river was questioned by the commissioners of the State reservation at Niagara. An opinion was obtained from the attorney-general of the State of New York (copy appended marked "A") in which it was held that the Niagara River is a navigable river in law, that the company had no right to increase the capacity of its canal, that it had no right to

divert any water from the river, and that a diversion of water sufficient to diminish the flow over the falls was a nuisance and could be restrained.

The New York legislature thereupon passed an act (Chap. 968, Laws of 1896), in which the right of the company "To take, draw, use and lease and sell to others to use the waters of Niagara River for domestic, municipal, and sanitary purposes, and to develop power therefrom for its own use and to lease and sell to others to use for manufacturing, heating, lighting, and other business purposes, is hereby recognized, declared and confirmed." No limit as to the time during which these rights were to exist was fixed, but the amount of water to be taken was limited to that which could be drawn by a canal 100 feet wide, with such depth and slope as would maintain at all times a depth of 14 feet. The amount of water thus described is not specific. It is computed to be about 9,500 cubic feet per second for the works now under construction, but it would be possible to construct works under different plans which would use a much greater quantity of water. The Company is now using about 4,000 cubic feet per second. It is extending its works, and expects to develop about 134,000 horsepower, in addition to which its tenant companies will develop about 8,000 horsepower. It has paid nothing to the State for its privileges. A list of the more important industries which this company supplies with electricity is given in Appendix B. Its managers estimate that the power plant and the industries dependent upon it for power represent an investment of $10,000,000.

9. II. Niagara Falls Power Company.—In 1886 the New York legislature granted a charter to a company called the "Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls," subsequently amended in 1886, 1889, 1891, 1892, and 1893. (See chapter 83, 1886; chapter 489, 1886; chapter 109, 1889; chapter 253, 1891; chapter 513, 1892; chapter 477, 1893.) In 1889 the name of the company was changed to "The Niagara Falls Power

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Company." It is authorized to take water sufficient to generate 200,000 horsepower, computed to be about 17,200 cubic feet per second. Its franchise is for fifty years from March 31, 1886. The location of its works is shown upon the map. Beginning about a mile above the falls a short intake canal is constructed nearly at right angles with the river shore. Upon each side of the canal deep pits are excavated in the rock, at the bottom of which are placed the turbines, and over which are placed the power houses. The water, after passing through the turbines, is carried off by a tunnel about 21 feet in diameter under the city of Niagara Falls to the lower river, a distance of about 7,000 feet. The company has in operation two power houses having a combined capacity of about 105,000 horsepower.

It is working the plant nearly to its full present capacity, using about 8,000 cubic feet per second, in addition to which one of its tenant companies is using about 600 cubic feet. It paid nothing to the State for its privileges, but is bound to furnish free of charge electricity for light and for power and also water for the use of the State in the State reservation at Niagara and the buildings thereon, when requested to do so by the commissioners of the State reservation. It distributes electric power over a wide area of territory and to a great variety of commercial interests in Niagara Falls, Tonawanda, Olcott and Buffalo, in some cases over 35 miles distant. A list of the consumers dependent upon this company is given in Appendix C. The investment is stated by the managers to be over $6,000,000 in the power plant, and $7,000,000 or $8,000,000 in other industries established on its lands at Niagara Falls and dependent upon it.

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25. Full and precise information concerning the plans and the legal rights of the companies which have not begun or completed their works has not been obtainable. In the cases of the corporations now furnishing or preparing to furnish electricity for commercial purposes, the franchises

are vague as to the volume of water to be used, which is the feature of greatest interest here. We have computed the volumes from the available data, and have endeavored to make the figures conservative. It must be understood that these figures are fair approximations. In preceeding to an examination of the effect upon Niagara Falls of the works proposed, the subject is much simplified by considering only those companies which derive their water from the Niagara River itself, and that is the course here pursued. Any effects caused by these works will be exaggerated by the other works mentioned.

26. The total quantity of water to be taken from the river by works now authorized is:

	Cubic feet.
Niagara Falls Hydraulic Power and Manufacturing Company	9,500
Niagara Falls Power Company	17,200
Canadian Niagara Power Company	9,500
Ontario Power Company, not including Welland River development	12,000
Electrical Development Company	11,200
Niagara Falls Park Railway Company	1,500
Total	60,900

* * * * * * * * * *

32. If the falls are to be preserved it must be by mutual agreement between the two countries. As a step in that direction we recommend that legislation be enacted which shall contain the following provisions, viz:

(a) The Secretary of War to be authorized to grant permits for the diversion of 28,500 cubic feet per second, and no more, from the waters naturally tributary to Niagara Falls, distributed as follows:

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	Cubic Feet
Niagara Falls Hydraulic Power and Manufacturing Company	9,500
Niagara Falls Power Company	8,600
Erie Canal or its tenants (in addition to lock service)	400
Chicago drainage canal	10,000

(b) All other diversion of water which is naturally tributary to Niagara Falls to be prohibited, except such as may be required for domestic use or for the service of locks in navigation canals.

(c) Suitable penalties for violation of the law to be prescribed.

(d) The foregoing prohibition to remain in force two years and then to become the permanent law of the land, if, in the meantime, the Canadian government shall have enacted legislation prohibiting the diversion of water which is naturally tributary to Niagara Falls, in excess of 36,000 cubic feet per second, not including the amounts required for domestic use or for the service of locks in navigation canals. It is assumed, however, that an understanding upon this subject would be reached by treaty.

* * * * * * * * * *

Very respectfully,

(Signed) O. H. Ernst,
Colonel, Corps of Engineers, Chairman.

(Signed) George Clinton,
Member.

(Signed) Geo. Y. Wisner,
Member, American Section.

The Secretary of War,
Washington, D. C.

Burton Act, June 29, 1906, 34 Stat. 626.

Fifty-Ninth Congress—Session I.

Chap. 3621. *An Act For the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes.*

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the diversion of water from Niagara River or its tributaries, in the State of New York, is hereby prohibited, except with the consent of the Secretary of War as hereinafter authorized in section two of this Act: PROVIDED, That this prohibition shall not be interpreted as forbidding the diversion of the waters of the Great Lakes or of Niagara River for sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States, or by the Secretary of War of the United States under its direction.

Sec. 2. That the Secretary of War is hereby authorized to grant permits for the diversion of water in the United States from said Niagara River or its tributaries for the creation of power to individuals, companies, or corporations which are now actually producing power from the waters of said river, or its tributaries, in the State of New York, or from the Erie Canal; also permits for the transmission of power from the Dominion of Canada into the United States, to companies legally authorized therefor, both for diversion and transmission, as hereinafter stated, but permits for diversion shall be issued only to the individuals, companies, or corporations as aforesaid, and only to the amount now actually in use or contracted to be used in factories the buildings for which are now in process of construction, not exceeding to any one individual, company, or corporation as aforesaid a maximum amount of eight thousand six hundred cubic feet per second, and not exceeding to all individuals, companies, or corporations as aforesaid an aggregate amount of fifteen thousand six hundred cubic feet per second; but no revocable permits shall be is-

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sued by the said Secretary under the provisions hereafter set forth for the diversion of additional amounts of water from the said river or its tributaries until the approximate amount for which permits may be issued as above, to wit, fifteen thousand six hundred cubic feet per second, shall for a period of not less than six months have been diverted from the waters of said river or its tributaries, in the State of New York; PROVIDED, That the said Secretary, subject to the provisions of section five of this Act, under the limitations relating to time above set forth is hereby authorized to grant revocable permits, from time to time, to such individuals, companies, or corporations, or their assigns, for the diversion of additional amounts of water from the said river or its tributaries to such amount, if any, as, in connection with the amount diverted on the Canadian side, shall not injure or interfere with the navigable capacity of said river, or its integrity and proper volume as a boundary stream, or the scenic grandeur of Niagara Falls; and that the quantity of electrical power which may by permits be allowed to be transmitted from the Dominion of Canada into the United States, shall be one hundred and sixty thousand horsepower: PROVIDED FURTHER, That the said Secretary, subject to the provisions of section five of this Act, may issue revocable permits for the transmission of additional electrical power so generated in Canada, but in no event shall the amount included in such permits, together with the said one hundred and sixty thousand horsepower and the amount generated and used in Canada, exceed three hundred and fifty thousand horsepower: PROVIDED ALWAYS, That the provisions herein permitting diversions and fixing the aggregate horsepower herein permitted to be transmitted into the United States, as aforesaid, are intended as a limitation on the authority of the Secretary of War, and shall in no wise be construed as a direction to said Secretary to issue permits, and the Secretary of War shall make regulations preventing or limiting the diversion of water and the admission of electrical power as herein stated; and the permits for the transmission of electrical power issued

by the Secretary of War may specify the persons, companies, or corporations by whom the same shall be transmitted, and the persons, companies, or corporations to whom the same shall be delivered.

Sec. 3. That any person, company, or corporation diverting water from the said Niagara River or its tributaries, or transmitting electrical power into the United States from Canada, except as herein stated, or violating any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And, further, the removal of any structures or parts of structures erected in violation of this Act, or any construction incidental to or used for such diversion of water or transmission of power as is herein prohibited, as well as any diversion of water or transmission of power in violation hereof, may be enforced or enjoined at the suit of the United States by any circuit court having jurisdiction in any district in which the same may be located, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

Sec. 4. That the President of the United States is respectfully requested to open negotiations with the Government of Great Britain for the purpose of effectually providing, by suitable treaty with said Government, for such regulation and control of the waters of Niagara River and its tributaries as will preserve the scenic grandeur of Niagara Falls and of the rapids in said river.

Sec. 5. That the provisions of this Act shall remain in force for three years from and after date of its passage, at the expiration of which time all permits granted hereunder by the Secretary of War shall terminate unless sooner revoked, and the Secretary of War is hereby authorized to revoke any or all permits granted by him by authority of this Act, and nothing herein contained shall be held to confirm, establish, or confer any rights heretofore

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claimed or exercised in the diversion of water or the transmission of power.

Sec. 6. That for accomplishing the purposes detailed in this Act the sum of fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated from any moneys in the Treasury not otherwise appropriated.

Sec. 7. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 29, 1906. (34 Stat. L. 626)

Application of The Niagara Falls Power Company for a Permit, July 3, 1906.

BEFORE THE SECRETARY OF WAR

In the Matter of

The Application of THE NIAGARA FALLS POWER COMPANY for a Permit for the Diversion of Water in the United States from the Niagara River.

TO THE HONORABLE WILLIAM H. TAFT,
Secretary of War.

The Niagara Falls Power Company (hereinafter called the applicant), a corporation duly organized under the laws of the State of New York, and now actually producing power from the waters of the Niagara River in the State of New York, and having its principal office and its power producing plants in the City of Niagara Falls, in the said State of New York, recognizing that under the menace of the stringent provisions of and the severe penalties imposed by the Act of the First Session of the Fifty-ninth Congress entitled "An Act for the Control and Regulation of the Waters of Niagara River, for the Preservation of Niagara Falls, and for other Purposes," it will be impossible for the applicant to conduct its business except under the authority of the permit of the Secretary of War referred to and provided for in Section 2 of the said Act, in its own behalf and in behalf of its power tenants hereinafter described, and under the provisions of the said Act hereby respectfully applies to the Secretary of War for

A permit for the diversion of water in the United States from the Niagara River, for the creation of power, to the amount of eight thousand six hundred (8,600) cubic feet per second.

This is the amount of water of said Niagara River now actually in use by the applicant, as reported by the International Waterways Commission, Senate Document 242, § 9, p. 5; § 30, p. 11.

The applicant, however, respectfully PROTESTS against the provisions of the said Act in so far as the same prohibit or are inconsistent with the present and continued exercise by the applicant of its just and lawful right, during the continuance of its works, to divert the waters of the said Niagara River and to use the same for the creation of power, to an extent sufficient to produce 200,000 effective horsepower; and WITHOUT WAIVING, respectfully reserves the applicant's said right, and all right now vested in it, or to which it is now entitled (1) under the Common Law, or (2) under the Statutes of the State of New York.

Herewith the applicant respectfully submits a statement designated Schedule A, which, together with Schedule B and the other Schedules therein referred to, are hereto annexed and are hereby made a part of this application, the said statement containing a recital of the facts and of the laws upon which the applicant's said rights are based, and under which also it is entitled to the permit for which this application is made.

IN WITNESS WHEREOF, The Niagara Falls Power Company has caused its corporate name and seal to be hereunto affixed, and this application to be executed by its Vice-President thereunto duly authorized this 3rd day of July, 1906.

THE NIAGARA FALLS POWER COMPANY,
By EDWARD A. WICKES,
Vice-President,
APPLICANT.

(SEAL)

Attest:
F. L. LOVELACE,
Secretary.

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SCHEDULE A.

STATEMENT.

I. The Niagara Falls Power Company (hereinafter called the applicant) was created, organized and continued by six Acts of the Legislature of the State of New York as follows, to wit:—Chapter 83 of the Laws of 1886, Chapter 489 of the Laws of 1886, Chapter 109 of the Laws of 1889, Chapter 253 of the Laws of 1891, Chapter 513 of the Laws of 1892 and Chapter 477 of the Laws of 1893. A printed copy of the first five acts consolidated and copies of the other two are hereto annexed and designated as Schedule B and are made part hereof.

Since the enactment of the above mentioned Statutes of the State of New York on or about the 24th day of May, 1901, under the provisions of the General Laws of the State of New York, applicable to the said applicant, the corporate existence of the said applicant was extended until March 31, A. D. 2036.

II. At the time of the enactment of the Act of the First Session of the Fifty-ninth Congress "for the Control and Regulation of the Waters of Niagara River, for the Preservation of Niagara Falls, and for other Purposes" (hereinafter referred to as the Act for the Preservation of Niagara Falls) the applicant was and now is actually producing power from the water of the Niagara River in the State of New York.

The amount of water of the said Niagara River at the time of the passage of the said Act for the Preservation of Niagara Falls actually in use and now actually in use by the applicant is eight thousand six hundred (8,600) cubic feet per second.

III. At the time of the enactment of the said Act the applicant was and now is creating and supplying from its power plants in the City of Niagara Falls, in the State of New York, power for the use of individuals, companies, or corporations, with whom it has contracts for the provision

of power produced from the water of the Niagara River in the State of New York, which said tenants in the foregoing application and hereinafter are designated as its power tenants. The names of the said power tenants and the amounts of power now used by each thereof and supplied to each thereof by the applicant from power produced by it from the water of the Niagara River in the State of New York are as set forth in the following list thereof in this Clause III; it being understood that the amount of the said use by each said tenant is subject to constant fluctuation and that the maximum use of each is not coincident, and that at present and at times within the past year and during the repair of some of the generating units in the plant of the applicant some part of the said power so provided has been transmitted from the plant of the Canadian Niagara Power Company, which latter Company is owned and controlled by the applicant.

LIST OF POWER TENANTS AND AMOUNTS OF POWER IN USE BY EACH.

Tenant.	*Power Used.*
Acetyvone Manufacturing Company	35
Acheson Siloxicon Articles Company	20
Buffalo & Niagara Falls Electric Light & Power Company	1,600
The Carborundum Company	4,000
Castner Electrolytic Alkali Company	9,000
Cataract Consumers Brewery	160
Cataract Power & Conduit Company	32,000
Composite Board Company	200
Development & Funding Company	1,000
Francis Hook & Eye & Fastener Company	20
International Acheson Graphite Company	2,000
International Paper Company	8,000
International Railway Co. (North Tonawanda)	2,800
International Railway Co. (Niagara Falls)	1,500

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Tenant.	*Power Used.*
Lockport Paper Company	600
The Niagara Falls Power Company (Use about plant)	1,000
The Natural Food Company	800
Niagara Electro-Chemical Company	3,500
Niagara Research Laboratories	120
Niagara River Manufacturing Company	800
Niagara Tachometer & Instrument Company	15
Niagara Falls Water Works Company	500
Norton Emery Wheel Company	2,000
Oldbury Electro-Chemical Company	3,000
Ozone Vanillin Company	120
Phosphorus Compounds Company	60
Pittsburgh Reduction Company	8,500
Ramapo Iron Works	600
Roberts Chemical Company	500
Suburban Power Company	100
Tonawanda Power Company	3,000
Union Carbide Company	15,000
	102,550

The foregoing application is made in behalf of the applicant and of said power tenants, all of whom, except the Tonawanda Power Company, Cataract Power & Conduit Company and The Natural Food Company, operate on the lands of the applicant hereinafter referred to, which it purchased for the purpose of providing sites for manufacturing concerns using the power generated by it from the water of the Niagara River in the State of New York. The applicant has sold and by a limited and restricted form of conveyance conveyed to the said International Paper Company, Castner Electrolytic Alkali Company and the Cataract Consumers Brewery the sites occupied by them respectively, the applicant, however, still retaining an interest in and for all power purposes control over said lands so sold.

The power provided to the said power tenants is in the form of electricity, except only in the cases of The Niagara Falls Water Works Company and the International Paper Company, to each of which Companies the applicant has granted by lease a right to take water from the applicant's intake canal for the purpose of the production of hydraulic power, and after the production of such power to discharge the tail water into the applicant's tail race tunnel.

IV. In addition to the amounts of power listed in the foregoing Clause III hereof, the applicant now has contracts with its aforesaid power tenants for the provision of additional amounts of power aggregating about 63,000 horse-power.

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IX. In pursuance of its said lawful rights in the premises, the applicant, at a distance of about one and one-third miles above the American Fall on its said lands fronting on the Niagara River, has constructed its generating and distributing plants for the purpose of using the water of the said River for producing and distributing power, and has located on said lands divers large and important industries and factories for the use of the power so produced by the applicant. In the construction of its said generating and distributing plants, and in acquiring its said lands and other accessories to such power development, the applicant has invested upwards of $13,000,000, and the other industries and factories located on its said lands represent a further investment by the owners thereof of upwards of $7,000,000. The said power generating plants of the applicant, located as aforesaid and now operated by it, are two in number, to wit: (1) Power House No. 1 consisting of ten generating units of 5,000 h. p. capacity each with all the necessary accessories for the operation of all of the same, and (2) Power House No. 2 consisting of eleven generating units of 5,500 h. p. capacity each with all the necessary accessories for the operation of all of the same.

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The said power generating plants now are being operated by the applicant substantially to their full capacity and the power so generated is supplied therefrom to the applicant's said power tenants hereinbefore listed.

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Upon the facts above recited, the applicant without further warrant or grant or permit, is now justly and fully entitled to complete its said original plan and undertaking for the development of 200,000 effective horse-power from the water of the Niagara River in the State of New York, and in submitting this application for a permit of the Secretary of War under the provisions of the said Act for the Preservation of Niagara Falls, the applicant desires fully to preserve and in no respect to waive its rights in the premises or any part thereof.

THE NIAGARA FALLS POWER COMPANY,
By EDWARD A. WICKES,
Vice-President.

Report by the American Members of the International Waterways Commission, November 15, 1906.

INTERNATIONAL WATERWAYS COMMISSION,
Office of American Section,
Buffalo, N. Y. November 15, 1906.

MR. SECRETARY: The American members of the International Waterways Commission have the honor to return herewith the report, dated October 5, 1906, by Captain Charles W. Kutz, Corps of Engineers, U. S. Army, upon the subject of permits for diverting water on the American side at Niagara Falls, referred to them by your indorsement of October 13.

In our report dated September 29, 1906, we gave a brief description of the four kinds of permits authorized by the act approved June 29, 1906, and we concurred in the

recommendations contained in Captain Kutz's report of August 15, 1906, which referred to permits of the third kind, or those for transmitting electrical power from Canada into the United States to the aggregate amount of 160,000 horsepower. The report by Captain Kutz now under consideration refers to permits of the first kind, or those for diverting water from the Niagara River on the American side to an aggregate amount not exceeding 15,600 cubic feet per second.

The conditions prescribed in the law for this kind of permits are that—

1. They must be issued "to individuals, companies or corporations which are now actually producing power from the waters of said river or its tributaries in the State of New York or from the Erie Canal."

2. The amount of water to be allowed must not exceed that "now actually in use or contracted to be used in factories the buildings for which are now in process of construction."

3. The amount to be allowed "to any one individual, company or corporation as aforesaid" must not exceed 8,600 cubic feet per second.

4. The total amount to be allowed "to all individuals, companies or corporations as aforesaid" must not exceed an aggregate of 15,600 cubic feet per second.

Applications have been received from the Niagara Falls Power Company for a permit to divert 8,600 cubic feet per second, from the Niagara Falls Hydraulic Power and Manufacturing Company for a permit to divert 6,400 cubic feet per second, and from numerous industries at Lockport and at Medina, using small quantities of water from the Erie Canal.

After a careful examination of all the circumstances which should affect a decision as to the amount of water to be allowed under the act, including the capital invested, the present capacity of the works and their present output, the quantity of water now actually in use, the contracts made for furnishing power, with the dates of such con-

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tracts, the future capacity of the works as projected, and the charter rights under New York State law, Captain Kutz reaches the conclusion that a permit should be granted to the Niagara Falls Power Company for the maximum amount allowed, viz, 8,600 cubic feet per second. He finds that the company and its tenants have that amount actually in use and may reasonably ask for the whole of it, and in that opinion we concur. He is in doubt whether it should include the water which is occasionally used for sluicing debris and ice. The amount of this is not accurately known, but it is estimated at between 600 and 700 cubic feet per second during the sluicing process. It is used only intermittently. The total amount thus used in a year would, if distributed throughout the year, be but a small average per second. The law is explicit in prohibiting a permit for any amount whatever in excess of 8,600 cubic feet per second, but it seems a reasonable interpretation to take that as the general average and to allow the company to use a slightly less amount during the greater part of the year in order to accumulate enough water to supply the demands of sluicing upon the occasions when it is needed.

After a similar careful examination of all the circumstances relating to the Niagara Falls Hydraulic Power and Manufacturing Company, Captain Kutz reaches the conclusion that a permit should be granted to that company for the diversion of 5,743 cubic feet per second, exclusive of the amount required for sluicing, or for 6,403 cubic feet per second if the water for sluicing be included. The latter is estimated at 660 cubic feet per second. It seems to us desirable that the permits to the two companies should resemble each other in their provisions for sluicing. If to the 5,743 cubic feet per second just mentioned there be added 107 cubic feet per second as an average for sluicing, an allowance will be made for the accumulation of water which will provide 660 cubic feet per second for sluicing during one hundred and sixteen and two-thirds hours of each month, or fifty-nine days in each year, an allowance

which is ample. Under this arrangement the amount to be granted to this company for the use of itself and its tenants would be 5,850 cubic feet per second.

* * * * * * * * * *

We accordingly recommend that permits for the diversion of water from the Niagara River be granted to the Niagara Falls Power Company for 8,600 cubic feet per second and the Niagara Falls Hydraulic Power and Manufacturing Company for 5,850 cubic feet per second, it being understood that these are average amounts, and that the larger amounts occasionally required for sluicing may be accumulated by using generally smaller amounts.

Yours very respectfully,

(Signed) O. H. ERNST,
Chairman.
(Signed) GEORGE CLINTON,
Member.
(Signed) E. E. HASKELL,
Member.

HON. W. H. TAFT,
Secretary of War.

Report by Capt. Charles W. Kutz, Corps of Engineers.

(Attached to foregoing report of American Members of International Waterways Commission)

War Department,
Office of the Chief of Engineers,
Washington, October 5, 1906.

GENERAL: 1. Referring to the orders of the Secretary of War, dated July 14, 1906, in reference to the power situation at Niagara Falls, and to the report dated August 15, 1906, in reference to the Canadian power companies, and their associated transmission companies, I now have the

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honor to submit a report in reference to those companies seeking permits to divert water on the American side.

2. The law limits the present granting of permits for diversion to those individuals, companies, or corporations which are now using water for power purposes from the Niagara River, or its tributaries, or from the Erie Canal.

3. The only companies coming within the scope of the act of Congress are the Niagara Falls Power Company, the Niagara Falls Hydraulic Power and Manufacturing Company, and numerous small industries at Lockport and at Medina, N. Y.

4. Upon request, the two large companies prepared specific replies in writing to each of the questions propounded by the Secretary of War, and copies of these replies are appended hereto, marked Appendix I and Appendix J.

THE NIAGARA FALLS POWER COMPANY

5. This company was created, organized and continued by six acts of the legislature of the State of New York, as follows: Chapter 83 of laws of 1886, chapter 489 of the laws of 1886, chapter 109 of the laws of 1889, chapter 253 of the laws of 1891, chapter 513 of the laws of 1892, and chapter 477 of the laws of 1893. In section 2 of one of these acts (chapter 513, laws of 1892) it is provided—

> that nothing contained therein or in any of the former acts concerning said corporation shall be so construed as to confer an exclusive right nor any right to infringe upon the State reservation, or to obstruct the navigation of the Niagara River, or to take therefrom more water than shall be sufficient to produce two hundred thousand effective horse power.

6. The general construction adopted by this company for utilizing the energy of the Falls is as follows: A short canal has been excavated at a point about 1 mile above the Falls on the American side, its direction being approximately at right angles to the river; this canal is 250 feet

wide at the mouth, narrowing to 100 feet at its upper end; its depth is about 12 feet. Two power houses have been constructed on opposite sides of this canal. The water is carried by the means of penstocks to the turbines which are installed near the bottom of the two wheel pits under the two respective power houses. After leaving the turbines the water is discharged into a horseshoe-shaped tunnel with an area equivalent to that of a circle 21 feet in diameter, which carries it to the lower river, a distance of about 7,000 feet.

7. In power house No. 1 the turbines discharge their water into the tailrace openly without draft tubes. In power house No. 2 draft tubes are used, making the theoretical effective head 144 feet in power house No. 2 as against 136 feet in power house No. 1. These power houses have a combined generator capacity of 105,000 horsepower.

8. In addition to the above, water is supplied from the intake canal to the International Paper Company and to the pumping plant of the Niagara Falls Water Works Company.

9. As a result of more or less recent tests made by the engineers of the power company, it was determined that an average in the two power houses of 0.101 cubic foot of water per second was required to develop 1 electrical horse power at the switch board. If this determination is correct, the development of 100,000 electrical horsepower, the nominal capacity of the plant, would require 10,100 cubic feet of water per second. This amount exceeds by 1,500 cubic feet the amount computed as necessary under the assumed efficiency of the turbines and the theoretical effective heads noted above. This difference is due to certain defects in the design, the tailwater in the two wheel pits standing at such a level as to materially affect the effective head.

10. The plant of the International Paper Company, one of the power company's tenants, consists of 6 turbines, each rated 1,600 horsepower, and 2 centrifugal pumps, representing about 69 horsepower. The amount of water used

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by this company was determined by test made in 1904, using a current meter placed at various points in a given cross section of the paper mills headrace. These measurements were taken with an average of 87 per cent of gate opening, and showed a flow of about 660 cubic feet per second, or about 750 cubic feet per second with full gate opening.

11. The hydraulic plant of the Niagara Falls Water Works Company consists of two Pelton water wheels, each rated at 400 effective horsepower, and the amount of water used does not exceed 75 cubic feet per second. The officers of the Niagara Falls Power Company are of the opinion that the use of water by the Water Works Company for developing power to run their pumps is exempted from the prohibition of diversion on the ground that it is indirectly used for domestic and sanitary purposes.

12. Deducting the amounts used by its tenant companies, 825 cubic feet per second, from the maximum amount for which a permit can now be granted to any one individual, company, or corporation, that is, 8,600 cubic feet per second, there remains 7,775 cubic feet per second for use in the power plant. Again, deducting the amount used in the excited turbines, stated to be 35 cubic feet per second, and using the ratio obtained from the company's tests above mentioned, the maximum electrical output of this company is limited by law for the present to 76,630 electrical horsepower.

13. This limitation does not take into consideration the water that is occasionally used for sluicing debris and ice, the amount of which is not known. It is questionable whether water used for this purpose should be included in that for which a permit is considered necessary. Such use is intermittent, and it is practically impossible to determine the amount used at any given time. The Niagara Falls Hydraulic Power and Manufacturing Company estimates that 660 cubic feet per second is at times required for this purpose. If it be determined that water used for sluicing ice must be included in the amount covered by the

permit, the mid-winter electrical output of this company will be still further curtailed.

14. The maximum output of this company during the week preceding that in which the examination was made was 64,800 horsepower, while the average of the maximum weekly loads since October, 1905, was 73,000 horsepower.

15. The company in its statement includes a list of contracts for furnishing power in which the optional amounts aggregate 167,000 horsepower. Of this amount 102,550 horsepower has been called and is now in use. These contracts cover the output of both this plant and that of the Canadian Niagara Power Company. The amount called for represents the sum of the maximum amounts of power used by their tenants. These peak loads never occur simultaneously, and the actual peak electrical load generated up to date by the American and Canadian plants combined has been about 85,000 horsepower.

16. The books of this company show an investment in power plant of $13,500,000. This amount is largely in excess of what it would cost to reproduce it, as it is evident from the investments now being made on the Canadian side. It is also evident from the estimate of $7,000,000 given as the amount required to increase the capacity of the plant to the statutory limit—that is, 200,000 effective horsepower. This large investment, $135 per horsepower developed, is partly accounted for by the fact that this company was the pioneer in this method of utilizing the power of Niagara Falls, but it can not fairly be said to be due to investments made with the object of doubling the capacity of the plant. The intake is probably larger than necessary for the development of 100,000 horsepower, but the rest of the plant was designed for that amount. Notwithstanding this large investment, the books of the company show that its net earnings, after paying interest on its bonded debt and all other fixed charges, now amount to 9 per cent on its outstanding capital stock of over $4,000,000.

17. This company is entitled by reason of its contracts to the fullest consideration that is now possible under the

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law—*i.e.*, a permit for the diversion of 8,600 cubic feet per second. Such a permit will practically limit the company to its present output and will not allow any growth, but if this company is allowed to receive from the Canadian Niagara Power Company the amount recommended, 60,000 electrical horsepower, the normal development of the two companies considered as one will not be seriously interfered with.

The Niagara Falls Hydraulic Power and Manufacturing Company.

18. This company was chartered under the laws of the State of New York in 1878, and subsequently, by an act of the legislature of the State of New York, known as chapter 968, laws of 1896, its rights were confirmed. In this confirmatory act the company was limited and restricted to the use of "such quantity of water as may be drawn by means of the hydraulic canal of said company when enlarged through its entire length to a width of 100 feet and to a depth and slope sufficient to carry at all times a maximum uniform depth of 14 feet of water." This limitation is more or less indefinite, but the capacity of such a channel has been computed to be 9,500 cubic feet per second without material diminution of the head.

19. The canal leaves the Niagara River about 1 mile above the Falls and extends through the city to a point about one-half mile below the Falls, where the power houses of the company are situated.

20. It is being widened and deepened to the maximum authorized dimensions. The widening down to the water surface has been completed, except at two points, where work is now in progress. A great deal of work has also been done toward giving it a uniform depth of 14 feet throughout the width of 100 feet, but this work has not been completed.

21. The company disposes of its power in three ways. First, it sells water to six corporations, who develop power

with their own machines. This water is used under heads varying from 50 to 125 feet, with an average head, considering the quantities used at each elevation, of about 90 feet, or less than one-half of the maximum effective head. The amount of water so furnished is computed to be 1,332 cubic feet per second. In power house No. 2 (No. 1 being obsolete), situated on the river bank at the foot of the bluff, the company develops 32,000 mechanical horsepower, using for the purpose 2,011 cubic feet of water per second under an effective head of 200 feet. Of this amount, 27,368 mechanical horsepower are sold to customers, who convert it into electrical power by the use of generators attached to the power company's turbines. The remaining power developed in power house No. 2 is converted into and sold as electrical power. For several years past the company has been engaged in the further development of its water power, and now has under construction a forebay capable of furnishing sufficient water, when the canal has been widened and deepened to the extent authorized by law, to develop practically 100,000 additional horsepower. As stated above, much of the necessary enlargement work on the canal has been completed, the greater part of the excavation for the power house itself has been completed, the forebay is under construction, and intakes leading to the penstocks, with their corresponding gates and valves, are being installed for the complete development.

Of the amount to be developed in power house No. 3, 36,000 horsepower is for use of the Pittsburgh Reduction Company, a contract for its sale having been entered into on the 20th day of November, 1905. For developing this amount there will be required about 2,400 cubic feet of water per second. As the conditions laid down by the act of Congress have been complied with so far as this additional development is concerned, it is recommended that the necessary permit be issued. In the statement furnished by the company as to the water now in use, there is included 660 cubic feet per second for sluicing debris and ice. It is

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questionable whether this amount should be included in that for which a permit is considered to be necessary. Such use is intermittent, and it is practically impossible to determine the amount used at any given time. If the diversion of water for this purpose does not require a permit, this company is entitled under the law to a permit for 5,743 cubic feet per second, being the amount now actually in use and contracted to be used in factories in process of construction. If the water used for sluicing ice and debris must be included the permit should be for 6,403 cubic feet per second.

22. The settlement of this question will not affect the Niagara Falls Hydraulic Power and Manufacturing Company, but will affect the output of the Niagara Falls Power Company.

23. The investment represented by the plant of the Niagara Falls Hydraulic Power and Manufacturing Company is $5,600,000. This includes $1,400,000 expended or obligated for work on the canal and in connection with power house No. 3. It is estimated that $1,500,000 additional will be required for completing the canal and power house No. 3.

24. While the granting of a permit to this company for the diversion of 6,400 cubic feet per second will enable it to meet its contract obligations, it will not permit it to take the full advantage of the investment already made nor allow for any growth. The investment that will be rendered useless is roughly estimated at $290,000 for the canal and $360,000 for power house No. 3.

* * * * * * * * * *

Very respectfully,

CHARLES W. KUTZ,
Captain, Corps of Engineers.

BRIG. GEN. A. MACKENZIE,
Chief of Engineers, U. S. A.

Permit to The Niagara Falls Power Company, August 16, 1907.

NIAGARA FALLS POWER COMPANY PERMIT FOR THE DIVERSION OF WATER FROM THE NIAGARA RIVER FOR POWER PURPOSES.

WHEREAS, Under the provisions of an Act of Congress, approved June 29, 1906, entitled "An Act for the Control and Regulation of the Niagara River for the Preservation of Niagara Falls and Other Purposes," it is provided that the Secretary of War may grant permits for the diversion of water in the United States from said Niagara River or its tributaries for the creation of power, and that it shall not be lawful to divert water from said river, for power purposes, except in accordance with permits so issued by the Secretary of War; and

WHEREAS, upon the applications, hearings, reports and all the proceedings by applicants for permits under the provisions of the said Act, the Secretary of War, under date of January 18, 1907, filed a written opinion, directing, among other things, that a permit be issued to the Niagara Falls Power Co. for the diversion of 8600 cubic feet per second,

NOW, THEREFORE, this is to certify that the Secretary of War hereby gives permission to the Niagara Falls Power Company to divert 8600 cubic feet of water per second from the Niagara River, upon the following terms and conditions:

FIRST: The amount above named, 8600 cubic feet per second, represents the maximum quantity of water that can be diverted at any time under the terms of this permit.

SECOND: The grantee shall make, under the supervision of an authorized inspector of the United States, measurements in its intake canals of such a character and at such times as may be deemed necessary to show the amount of water diverted.

THIRD: The grantee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of its customers to whom water power or mechanical horse power is furnished.

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FOURTH: The power stations of the grantee, and of its customers, to whom water power or mechanical horse power is furnished, together with their operating records, shall be subject to inspection at all times by authorized inspectors of the United States.

FIFTH: This permit is issued without any determination of priority of right to divert water from the Niagara River between the parties to whom such permits, for diversion, may be issued.

SIXTH: The Secretary of War reserves the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the Act of June 29, 1906, under which this permit is issued.

Witness my hand this sixteenth day of August 1907.

(Signed) WM. H. TAFT,
Secretary of War.

Congressional Joint Resolution, March 3, 1909, 35 Stat. 1169.

SIXTIETH CONGRESS—SESSION II.

Resolution No. 24. *Joint Resolution extending the operation of an Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes.*

WHEREAS, The provisions of the Act entitled "An Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," approved June 29, 1906, will expire by limitation on June 29, 1909; and

WHEREAS, A date for the termination of the operation of said Act was provided therein, but with a view to the more permanent settlement of the questions involved by a treaty with Great Britain, and by further legislation appropriate

to the situation and such treaty not having been negotiated, it is desirable that the provisions of said Act should be continued until such permanent settlement can be made: Therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions of the aforesaid Act be, and they are hereby, extended for two years from June 29, 1909, being the date of the expiration of the operation of said Act, save in so far as any portion thereof may be found inapplicable or already complied with.

Approved, March 3, 1909. (35 Stat. L. 1169)

International Boundary Waters Treaty of 1910, 36 Stat. 2448.

Convention Concerning the Boundary Waters Between the United States and Canada.

Signed at Washington January 11, 1909; ratification advised by the Senate March 3, 1909; ratified by the President April 1, 1910; ratified by Great Britain March 31, 1910; ratifications exchanged at Washington May 5, 1910; proclaimed May 13, 1910.

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

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His Britannic Majesty, the Right Honorable James Bryce, O. M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

Preliminary Article

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Article I.

The High Contracting Parties, agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use, thereof, but all such rules and

regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof.

ARTICLE II.

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no

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further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE IV.

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

ARTICLE V.

The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

ARTICLE VI.

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are

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to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other, by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

Article VII.

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

ARTICLE VIII.

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and

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indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

ARTICLE IX.

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

ARTICLE X.

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any re-

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strictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of The Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

ARTICLE XI.

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor General of the Dominion of Canada, and to them shall be addressed all communications of the Commission.

ARTICLE XII.

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall,

before proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States and Canadian sections of the Commission may each appoint a secretary, and these shall act as joint secretaries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission, incurred by it, shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses, and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

Article XIII.

In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Can-

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ada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

ARTICLE XIV.

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the treaty shall take effect on the date of the exchange of its ratifications. It shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either High Contracting Party to the other.

In faith whereof the respective plenipotentiaries have signed this treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of January, in the year of our Lord one thousand nine hundred and nine.

(Signed) ELIHU ROOT (SEAL)
(Signed) JAMES BRYCE (SEAL)

And whereas the Senate of the United States by their resolution of March 3, 1909, (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of the said Treaty with the following understanding, to wit:

> "Resolved further, as a part of this ratification, That the United States approves this treaty with the understanding, that nothing in this treaty shall be construed as affecting, or changing, any existing territorial or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's river at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation

canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's river, within its own territory, and further, that nothing in this treaty shall be construed to interfere with the drainage of wet swamp and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will, in effect, form part of the treaty;"

And whereas the said understanding has been accepted by the Government of Great Britain, and the ratifications of the two Governments of the said treaty were exchanged in the City of Washington, on the 5th day of May, one thousand nine hundred and ten;

Now, therefore, be it known that I, WILLIAM HOWARD TAFT, President of the United States of America, have caused the said treaty and the said understanding, as forming a part thereof, to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of May in the year of our Lord one thousand nine hundred and
(SEAL) ten, and of the Independence of the United States of America the one hundred and thirty fourth.

WM. H. TAFT

By the President:
P. C. KNOX
Secretary of State.

PROTOCOL OF EXCHANGE

On proceeding to the exchange of the ratifications of the treaty signed at Washington on January 11, 1909, between

BLEED THROUGH-

the United States and Great Britain, relating to boundary waters and questions arising along the boundary between the United States and the Dominion of Canada, the undersigned plenipotentiaries, duly authorized thereto by their respective Governments, hereby declare that nothing in this treaty shall be construed as affecting, or changing, any existing territorial, or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory, and further, that nothing in this treaty shall be construed to interfere with the drainage of wet, swamp, and overflowed lands into streams flowing into boundary waters, and also that this declaration shall be deemed to have equal force and effect as the treaty itself and to form an integral part thereto.

The exchange of ratifications then took place in the usual form.

In witness whereof, they have signed the present Protocol of Exchange and have affixed their seals thereto.

Done at Washington this 5th day of May, one thousand nine hundred and ten.

PHILANDER C. KNOX (SEAL)
JAMES BRYCE (SEAL)

Congressional Joint Resolution, August 22, 1911. (37 Stat. 43)

SIXTY-SECOND CONGRESS—SESSION I.

Resolution No. 9. *Joint Resolution extending the operation of the Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes.*

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions of an Act entitled "An Act for the control of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," be, and they are hereby, extended and re-enacted from June twenty-ninth, nineteen hundred and eleven, being the date of the expiration of the operation of said Act, to March first, nineteen hundred and twelve.

Approved, August 22, 1911. (37 Stat. L. 43)

Extension of Permit, September 2, 1911.

WAR DEPARTMENT
21644 Washington

September 2, 1911.

Gentlemen:

By joint resolution of Congress approved August 22, 1911, (Public Resolution—No. 9) the provisions of the Act entitled "An Act for the control of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," are extended and reenacted from June 29th, 1911, the date of the expiration of the operation of said Act, to March 1st, 1912.

In accordance with the foregoing, I beg to advise you that the permit heretofore granted to your Company by

BLEED THROUGH-

the Secretary of War, dated August 16th, 1907, under the provisions of the Act of Congress approved June 29th, 1906, (34 Stat. L., 626) authorizing the diversion of water from the Niagara River, is hereby extended, subject to the provisions and conditions thereof, the terms of the act cited and the joint resolutions extending the same.

Acknowledgment of receipt of this letter is requested.

Very respectfully,

(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk
For the Secretary of War in his absence.

To—
Niagara Falls Power Company.

Congressional Joint Resolution, April 5, 1912.
(37 Stat. 631)

SIXTY-SECOND CONGRESS—SESSION II.

Resolution No. 12. *Joint Resolution extending the operation of the Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes.*

WHEREAS, The provisions of the Act entitled "An Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," approved June twenty-ninth, nineteen hundred and six, and extended to June twenty-ninth, nineteen hundred and eleven, by joint resolution (Public Resolution numbered Fifty-six), and further extended to Marel irst, nineteen hundred and twelve, by joint resolution, (Public Resolution numbered Nine), approved August twenty-second, nineteen hundred and eleven, expires March first, nineteen hundred and twelve: Be it therefore

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

That the provisions of the aforesaid Act be, and they are hereby, reenacted and extended from March first, nineteen hundred and twelve, being the date of the expiration of said Act, to March fourth, nineteen hundred and thirteen.

Approved, April 5, 1912. (37 Stat. L. 631)

Extension of Permit, April 23, 1912.

WAR DEPARTMENT
Washington

April 23, 1912.

Gentlemen:

By Joint Resolution of Congress approved April 5, 1912 (Public Resolution—No. 24) the provisions of the Act entitled "An Act for the control and regulation of the waters of Niagara River, for the preservation of Niagara Falls, and for other purposes," are re-enacted and extended from March 1st, 1912, the date of the expiration of said act to March 4, 1913.

In accordance with the foregoing, I beg to advise you that the permit heretofore granted to your company by the Secretary of War, dated August 16th, 1907, under the provisions of the Act of Congress approved June 29th, 1906 (34 Stat. L., 626) authorizing the diversion of 8,600 cubic feet of water per second from the Niagara River, is hereby extended, subject to the provisions and conditions thereof, the terms of the act cited and the joint resolutions extending the same.

Acknowledgment of receipt of this letter is requested.

Very respectfully,

(Signed) H. L. STIMSON
Secretary of War.

To—
Niagara Falls Power Company.

BLEED THROUGH-

Letter, Chief of Engineers to the Niagara Falls Power Company, July 19, 1913.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS,
Washington.

July 19, 1913.

The Niagara Falls Power Company,
Niagara Falls, N. Y.

Gentlemen:

1. The attention of all persons diverting water or contemplating the diversion of water from Niagara River for power purposes, is invited to the provisions of Sections 10 and 13 of the River and Harbor Act, approved March 3, 1899. Notice is hereby given that all diversions of water from Niagara River above and below the Falls are considered by this Department as subject to the provisions of those sections, and consequently as unlawful, except so far as recommended by the Chief of Engineers and approved by the Secretary of War.

2. For the present, no objection is being made by the War Department to existing diversions so long as the daily average does not exceed that of the permits and diversion limits which existed last year under the Burton Act; but any new diversions will require the specific authority of the Secretary of War. Applications for the necessary authority to change the former diversions or to make new ones, should be addressed to the Secretary of War. Applicants should state the maximum number of cubic feet of water per second, which the total of their projects will divert, and should furnish such plans and descriptions as may be necessary to give a full understanding of the application. The horsepower efficiency per cubic foot of water per second, practicable with machinery now installed, should be given. A statement should also be furnished showing the greatest horsepower efficiency per cubic foot

of water per second which the applicant expects to obtain, also at what date it is expected to obtain such efficiency, and what guarantee will be given that such efficiency will be obtained by the date specified.

Very respectfully,

(Signed) W. H. BIXBY
Chief of Engineers, U. S. Army.

1 Inclosure (copy of form No. 93,
O. C. of E., "Laws for the protection
and preservation of the navigable
waters of the United States") accomp'g.

Letter, Chief of Engineers to Mr. F. L. Lovelace, Secretary, July 19, 1913.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS,
Washington.

July 19, 1913.

Mr. F. L. Lovelace, Secretary,
Niagara Falls Power Company,
Niagara Falls, N. Y.

Sir:

1. Your two letters of June 27th were duly received, regarding Niagara Power Diversions.

2. Although the Secretary of War has not yet fully decided upon his future policy in such matters, I see no reason to suppose that he has any intention, prior to further specific action by Congress, of issuing any new water power permits, nor of objecting to any existing use of water within the limits approved in the past by his office under the provisions of the Burton bill; although it is probable that

BLEED THROUGH-

he would feel obliged to take action under Section 10 of the Act of March 3, 1899, in case, at any time, the total daily diversion at Niagara Falls should exceed the Burton Act limits.

3. As to my letter of May 26th, acknowledged by you June 9th and 27th, there is no fixed time limit for your full reply, the inquiry by this office not being made with respect to any immediate definite action by the War Department but only with respect to a probably future action at some indefinite date, whenever the several present general requests for a fuller utilization of possible heads, *i.e.*, a better conservation, shall result in a demand upon the War Department sufficient to force War Department action. Consequently it seemed desirable to this office to ask you what you were already in position to do in case such a matter were forced upon the Department and it still seems desirable that you shall keep this office posted to date in such matter as fast and as far as your investigations progress.

Very respectfully,

(Signed) W. H. Bixby
Chief of Engineers, U. S. Army

Congressional Joint Resolution, January 19, 1917. (39 Stat. 867)

Sixty Fourth Congress—Session II.

Joint Resolution Authorizing the Secretary of War to Issue Temporary Permits for Additional Diversions of Water from the Niagara River.

Chap. 18. Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of War be and he is hereby, authorized to issue permits, revocable at will, for the diversion of water in the United States from the Niagara River

above the Falls for the creation of power to individuals, companies, or corporations which are now actually producing power from the waters of said river, in additional quantities which, with present diversions, shall in no case exceed the capacity of the generating machinery of the permittee and tenant companies now installed and ready for operation, nor an amount sufficient to enable the permittee to supply the now existing hydroelectric demands of the individuals, companies, or corporations which said permittee and tenant companies are now supplying, but not in excess of the capacity of power-using appliances of said consumers now installed and ready for operation: PROVIDED, That in no event shall the total quantity of water diverted in the United States from said river above the Falls for power purposes exceed in the aggregate a daily diversion at the rate of twenty thousand cubic feet per second: AND PROVIDED FURTHER, That this resolution shall remain in force until the first day of July, nineteen hundred and seventeen, and no longer, at the expiration of which time all permits granted hereunder shall terminate, unless sooner revoked; and nothing herein contained shall be held to confirm, establish, or confer in or upon any such permittee any right in or to the water which he is now diverting or which he may be authorized to divert hereunder. Any such permittee who without further authority of Congress diverts after the time herein named for the expiration of such permit any part of the additional amount of water, authorized by Congress to be diverted for the first time under this resolution, shall be guilty of a misdemeanor and be punished by a fine not exceeding $2,000. nor less than $500., or by imprisonment not exceeding one year nor less than thirty days, or both in the discretion of the Court; and each and every day on which such violation occurs or is committed, shall be deemed a separate offense; PROVIDED, That where such violation is charged against the company or corporate body, the offense shall be taken and deemed to be that of any director, officer, agent, or employee of such Com-

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pany or corporate body ordering, directing, or permitting the same.

Approved, January 19, 1917. (39 Stat. L. 867.)

Permit to the Niagara Falls Power Company, January 19, 1917.

PERMIT FOR ADDITIONAL DIVERSION OF WATER FROM THE NIAGARA RIVER.

Subject to the provisions of the Joint Resolution of Congress, approved January 19, 1917, "Authorizing the Secretary of War to issue temporary permits for additional diversions of water from the Niagara River," permission, revocable at will, is hereby given the Niagara Falls Power Company, of Niagara Falls, New York, to divert water for power purposes additional to the eight thousand six hundred (8,600) cubic feet per second, the amount of water being diverted by said company on the date of the approval of said resolution, such additional amount not to exceed a daily diversion at the rate of one thousand four hundred (1,400) cubic feet per second. This permit, unless sooner revoked, shall expire in any event with the thirtieth day of June, nineteen hundred and seventeen, and is subject to further conditions as follows:

1.—The permittee shall furnish the United States Engineer Officer, Lake Survey Office, Detroit, Michigan, on or before the 25th day of January, 1917, a complete list of all individuals, companies and corporations, to which it is now delivering power, or has delivered power within the past four months, together with the amount furnished to each, and the limit between which the amount furnished to each individual, company or corporation has varied, and shall also furnish him promptly a complete list of all individuals, companies or corporations to which additional power is furnished between this date and the first day of July, 1917,

together with the amount of power allotted to each, and shall also certify in each case of the delivery of additional power, whether the individual, company or corporation to which delivery is made has increased the capacity of its power-using appliances since this date.

2.—The permittee shall make, under the supervision of an authorized inspector of the United States, measurements in its intake canals of such a character and at such times as may be deemed necessary to show the amount of water diverted.

3.—The permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to whom water power or mechanical horse power is furnished.

4.—The power stations of the permittee and of the consumers to whom water power or mechanical horse power is furnished, together with their operation records, shall be subject to inspection at all times by authorized inspectors of the United States.

5.—The Secretary of War has the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the said Joint Resolution; and the further right to revoke said permit at will.

WITNESS my hand this nineteenth day of JANUARY, 1917.

(Signed) WM. M. INGRAHAM,
Acting Secretary of War.

BLEED THROUGH-

Congressional Joint Resolution, June 30, 1917. (40 Stat. 241)

SIXTY-FIFTH CONGRESS—SESSION I.

Chap. 34.—*Joint Resolution Extending the time within which the "Joint resolution authorizing the Secretary of War to issue temporary permits for additional diversions of water from the Niagara River" shall remain in effect.*

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That public resolution number forty-five of the Sixty-fourth Congress approved January nineteenth, nineteen hundred and seventeen, entitled "Joint resolution authorizing the Secretary of War to issue temporary permits for additional diversions of water from the Niagara River," is continued in full force and effect, and under the same conditions, restrictions, and limitations, until July first, nineteen hundred and eighteen: PROVIDED, That the Secretary of War is hereby authorized and directed to make a comprehensive and thorough investigation, including all necessary surveys and maps, of the entire subject of water diversions from the Great Lakes and the Niagara River, including navigation, sanitary and power purposes, and the preservation of the scenic beauty of Niagara Falls and the rapids of Niagara River, and to report to Congress thereon at the earliest practicable date. To carry out the provisions of this proviso, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $25,000.

Approved, June 30, 1917. (40 Stat. L. 241.)

Extension of Permit, July 2, 1917.

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS,
Washington,

July 2, 1917.

The Niagara Falls Power Co.
Niagara Falls, N. Y.

Gentlemen:

The following notation has been added to the Department's copy of the permit of January 19th, 1917, to the Niagara Falls Power Company for additional diversion of water from the Niagara River:

"War Department, June 30, 1917. In accordance with the provisions of S. J. Res. 13, 65th Congress, approved this date, the foregoing permit is hereby continued in force until July first, 1918, subject to all of the conditions and restrictions therein contained, prompt report of all additional power furnished under this extension to be made in the manner specified in condition one.

(Signed) NEWTON D. BAKER,
Secretary of War."

By direction of the Chief of Engineers:

Very respectfully,

(Signed) C. KELLER,
Lt. Col., Corps of Engineers.

BLEED THROUGH-

Requisition Order, December 28, 1917 (NFPCo.)

COUNCIL OF NATIONAL DEFENSE
WASHINGTON

December 28, 1917.

To Niagara Falls Power Company,
Niagara Falls, N. Y.

Sirs:

The President of the United States, by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for, and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

(Signed) NEWTON D. BAKER,
Secretary of War.

RJB-F

Requisition Order, December 28, 1917 (HPCo.)

COUNCIL OF NATIONAL DEFENSE
WASHINGTON

December
Twenty-eighth,
1917.

To the Hydraulic Power Company of Niagara Falls and Cliff Electrical Distributing Company and each of them.

Sirs:

The President of the United States, by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of hydraulic, mechanical and/or electrical power which is capable of being produced and/or delivered by you, or either of you, through the use of all waters diverted or capable of being diverted through the hydraulic canal of the Hydraulic Power Company and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order will be given precedence over any and all other orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

(Signed) NEWTON D. BAKER,
Secretary of War.

BLEED THROUGH-

Congressional Joint Resolution, June 29, 1918. (40 Stat. 633)

SIXTY-FIFTH CONGRESS—SESSION II.

Joint Resolution Authorizing the Secretary of War to Issue Permits for the Diversion of Water from the Niagara River.

CHAP. 111. RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of War be, and he is hereby, authorized to issue permits revocable at will, for the diversion of water in the United States from the Niagara River above the Falls for the creation of power to individuals, companies, or corporations which are now actually producing power from the waters of said river, in quantities which in no event shall exceed in the aggregate a daily diversion at the rate of twenty thousand cubic feet per second: PROVIDED, That this resolution shall remain in force until the 1st day of July, 1919, and no longer, at the expiration of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversions of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect. Any individuals, companies, or corporations violating any of the provisions of said permits, or diverting water from said river above the Falls for the creation of power, except under a permit issued under the authority of this law, shall be guilty of a misdemeanor and be punished by a fine not exceeding $2,000 nor less than $500, or by imprisonment not exceeding one year nor less than thirty days, or both in the discretion of the court; and each and every day on which such violation occurs or is committed shall be deemed a separate offense: PROVIDED, that where such violation is charged against the company or corporate body, the offense shall be taken and deemed to be that of any director, officer, agent, or employee of such

company or corporate body ordering, directing, or permitting the same.

Approved June 29, 1918 (40 Stat. L. 633).

Permit to the Niagara Falls Power Company, July 1, 1918.

PERMIT FOR THE DIVERSION OF WATER FROM NIAGARA RIVER FOR POWER PURPOSES.

Subject to the provisions of the Joint Resolution of Congress, approved June 29, 1918, authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River, permission, revocable at will by the Secretary of War, is hereby given the Niagara Falls Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of ten thousand cubic feet per second, and that this permission shall be subject to further conditions as follows:

1.—All work and operations of said permittee for the diversion of water, or for the operation of, or changes in, its plant and accessories, and for the distribution of power shall be subject to the general supervision and approval of such division engineer or district engineer of the Engineer Department as the Secretary of War may designate by written notice to the said company.

2.—The permittee shall make, under the supervision of an inspector authorized in writing by the said engineer, measurements in its intake canals of such character and at such times as the said engineer may deem necessary to show the quantity of water diverted.

3. The permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to

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whom water power or mechanical horse power is furnished.

4.—The power stations of the permittee and of the consumers to whom water power or mechanical horse power is furnished, together with their operation records, shall be subject to inspection at all times by inspectors authorized in writing by the said engineer.

5.—All expenses of inspection shall be paid by the permittee in cases when collection from the permittee is approved by the Chief of Engineers, United States Army.

6.—The permittee shall promptly furnish the said engineer upon written notice from him, such information as he may specify concerning amount of power generated and delivered, to whom delivered, and limits of variation in delivery.

7.—The Secretary of War has the right, at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the said Joint Resolution.

WITNESS my hand this first day of July, 1918.

(Signed) NEWTON D. BAKER,
Secretary of War.

Extension of Permit, June 30, 1919.

WAR DEPARTMENT
WASHINGTON

In reply refer to
57243 Engrs.

June 30, 1919.

The Niagara Falls Power Company,
Niagara Falls, N. Y.

Sirs:

The Senate and House of Representatives have passed a resolution extending until July 1, 1920, the provisions of

the Joint Resolution of Congress, approved June 29, 1918, authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River.

Under the terms of the Resolution approved June 29, 1918, the permits granted under date of July 1, 1918, to the Niagara Falls Power Company and the Hydraulic Power Company, to divert water in the United States from the said river above the Falls for the creation of power will terminate on July 1, 1919, but the War Department will interpose no objection to the continued diversion of water from the Niagara River in accordance with the terms of those permits pending the approval of the new resolution by the President, on the understanding that if the resolution becomes a law, the diversion shall thereafter be governed by the terms of a new permit to be issued at that time.

Very respectfully,

(Signed) NEWTON D. BAKER,
Secretary of War.

Congressional Joint Resolution, July 12, 1919.
(41 Stat. 163)

SIXTY-SIXTH CONGRESS—SESSION I.

Chap. 23.—*Joint Resolution Authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River.*

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of War be and he is hereby, authorized to issue permits, revocable at will, for the diversion of water in the United States from the Niagara River above the Falls for the creation of power to individuals, companies, or corporations which are now actually producing

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power from the waters of said river, in quantities which in no event shall exceed in the aggregate a daily diversion at the rate of twenty thousand cubic feet per second: PROVIDED, That this resolution shall remain in force until the 1st day of July, 1920, and no longer, at the expiration of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversions of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect.

Any individuals, companies, or corporations violating any of the provisions of said permits, or diverting water from said river above the Falls for the creation of power, except under a permit issued under the authority of this law, shall be guilty of a misdemeanor and be punished by a fine not exceeding $2,000 nor less than $500, or by imprisonment not exceeding one year nor less than thirty days, or both in the discretion of the court; and each and every day on which such violation occurs or is committed shall be deemed a separate offense: PROVIDED, that where such violation is charged against the company or corporate body, the offense shall be taken and deemed to be that of any director, officer, agent, or employee of such company or corporate body ordering, directing, or permitting the same.

Approved, July 12, 1919. (41 Stat. 163.)

Permit to the Niagara Falls Power Company, July 30, 1919.

PERMIT FOR THE DIVERSION OF WATER FROM NIAGARA RIVER FOR POWER PURPOSES.

Subject to the provisions of the Joint Resolution of Congress, approved July 12, 1919, authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River above the Falls for the creation of power

to individuals, companies, or corporations, which are now actually producing power from the waters of said river, permission, revocable at will by the Secretary of War, is hereby given to The Niagara Falls Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of nineteen thousand, five hundred cubic feet per second, and that this permission shall be subject to further conditions as follows:

1.—That all work and operations of said permittee for the diversion of water, or for the operation of, or changes in, its plant and accessories, and for the distribution of power shall be subject to the general supervision and approval of such division engineer or district engineer of the Engineer Department at Large as the Secretary of War may designate by written notice to the said Company.

2.—That the permittee shall make, under the supervision of an inspector authorized in writing by the said engineer, measurements in its intake canals of such character and at such times as the said engineer may deem necessary to show the quantity of water diverted.

3.—That the permittee shall keep such records as will show at any time the combined continuous output of its power stations and of the power stations of the consumers to whom water power or mechanical horse power is furnished.

4.—That the power stations of the permittee and of the consumers to whom water power or mechanical horse power is furnished, together with their operation records, shall be subject to inspection at all times by inspectors authorized in writing by the said engineer.

5.—That all expenses of inspection shall be paid by the permittee in cases when collection from the permittee is approved by the Chief of Engineers, United States Army.

BLEED THROUGH-

6.—That the permittee shall promptly furnish the said engineer upon written notice from him, such information as he may specify concerning amount of power generated and delivered, to whom delivered, limits of variation in delivery, costs, and selling prices, and also conditions concerning sluicing of ice or trash, or other operations involving the by-passing or wasting of water.

7.—That the Secretary of War reserves the right at any time to modify the form of this permit, to change the method or plan of measurement herein prescribed, or to substitute other methods of measurement, whenever, in his judgment, such modifications, changes or substitutions are necessary to carry out the provisions of the said Joint Resolution.

Witness my hand this 30th day of July, 1919.

(Signed) NEWTON D. BAKER,
Secretary of War.

EXTRACTS FROM EXHIBITS TO APPLICATION OF THE NIAGARA FALLS POWER COMPANY TO THE FEDERAL POWER COMMISSION FOR A LICENSE, DATED JANUARY 3, 1921.

Extract from Exhibit "C".

(1) Water rights used and to be used in the project. (Regulation 6-E as specified in Regulation 4-K)

* * * * * * * * * * *

(1) WATER RIGHTS USED AND TO BE USED IN THE PROJECT (Regulation 6-E as specified in Regulation 4-K)

The nature, extent and ownership of the water rights which the applicant purposes to use in the development of the project or projects called for are as follows:

(a) The applicant is a corporation created by the consolidation of Cliff Electrical Distributing Company, The Niagara Falls Power Company (original name, The Niagara River Hydraulic Tunnel, Power and Sewer Company of Niagara Falls, New York, changed by order of the Supreme Court of the State of New York, November 11, 1889, to The Niagara Falls Power Company) and Hydraulic Power Company of Niagara Falls, as more fully appears in the information relative to applicant's organization and authority hereinbefore set forth.

(b) The applicant is the owner in fee simple of all the lands (including those used for its intakes) bordering on the Niagara River within the State of New York for a distance of about two miles immediately above the Falls of Niagara, and all the lands bordering on the Niagara River (including those used for discharge) for a distance of about 5,000 feet below the Falls of Niagara, excepting certain lands heretofore acquired by the State of New York for the State Reservation at Niagara. It is also the owner of the lands under the waters of the Niagara River adjoining all the shore lands owned by it in fee simple above the Falls of Niagara. This more fully appears by reference to

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the maps of its project works submitted with this application.

(c) The water rights therefor which applicant now uses and proposes to use in the development of the project applied for (including additions) are the sole property of applicant, and consist of (1) the common law riparian rights of the applicant as the owner of the bank of said river above, below and at the points of intake and discharge, with the corporeal hereditaments appurtenant thereto; (2) the ownership of the bed of the stream of the Niagara River at the points and places where it diverts water from said river; (3) grants and statute of the State of New York referred to otherwise in this application; (4) the conduct, agreement and pledge of the Government of the United States whereby a promise was given of a license from the Government of the United States under and in pursuance of and to the full extent permitted by the treaty between the United States and Great Britain, dated January 11, 1909 and promulgated May 13, 1910; in recognition of the investment of the applicant and the circumstances of its creation; (5) prescriptive rights.

There is no state agency to the knowledge of applicant which has any authority to make a certified statement in respect of the extent and validity of the applicant's water rights, which are based upon the common law prevailing in the State of New York and of the following statutes thereof, viz:

Chapter 83 of the Laws of 1886
Chapter 489 of the Laws of 1886
Chapter 109 of the Laws of 1889
Chapter 253 of the Laws of 1891
Chapter 513 of the Laws of 1892
Chapter 477 of the Laws of 1893
Chapter 968 of the Laws of 1896
Chapter 596 of the Laws of 1918
Chapter 597 of the Laws of 1918.

(d) the said right of the applicant to divert water from the Niagara River for the production of power pursuant to the statutes of the State of New York and the common law of the State of New York, is limited only by (1) the rights of the public in respect to navigation of the said river, and (2) Article V of the Treaty between the United States and Great Britain, proclaimed May 13, 1910, which limits the applicant's said water rights to not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second. The said article of said Treaty also provides as follows:

"It is the desire of both parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York."

The reference made in the above quotation is to the project of the applicant, the constituent and predecessor companies of which, and no others having made investments of the nature specified.

* * * * * * * * * * *

Exhibit "K" to Application of The Niagara Falls Power Company to the Federal Power Commission for a License, Dated January 3, 1921.

HISTORY OF PROJECT WORKS ALREADY CONSTRUCTED.

General

In the following history of the existing project works of The Niagara Falls Power Company the history pertaining to the existing project works of each of the constituent companies, namely, the Hydraulic Power Company of Niagara Falls, the Cliff Electrical Distributing Company and The Niagara Falls Power Company (constituent), hereinafter sometimes referred to as the Hydraulic Company, the Cliff Company and the Niagara Company, respectively, is

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separately set forth. Following the history of the existing project works is a description of the methods of financing.

Hydraulic Power Company

A company incorporated under the name of Niagara Falls Hydraulic Company let a contract in 1852 for the construction of a canal, hereinafter known as the "Hydraulic Canal", between a point at the head of the rapids above the Falls and the edge of the high bank down stream, therefrom. The course of the canal is shown in Exhibit "F", sheet #1 as beginning at Port Day and terminating in the Canal Basin. A lack of funds caused a suspension of the work in less than two years. Work was resumed in 1858 by the Niagara Falls Water Power Company which by July 1, 1861 had completed a canal 36 feet wide and about 8 feet deep. The Civil War prevented further operations, and for years the stream poured over the cliff practically unused.

The first power from the Hydraulic Canal was used in 1872 when an installation of 150 horse power under 25 feet head was made for driving a grist mill. In 1877 the canal property was purchased by Jacob F. Schoellkopf and associates, who formed the Niagara Falls Hydraulic Power and Manufacturing Company. Soon afterwards the construction of the Schoellkopf-Mathews flour mill was begun which was equipped with 900 horse power under 50 feet head. The flumes carrying water to the wheels were made of iron, nine feet in diameter, being the first iron penstocks used at Niagara Falls. Four years later the head on the mill was increased to 86 feet which at the time was the highest head used at Niagara.

The Hydraulic Canal at this period came into use to supply water for power and manufacturing purposes to other important mills. The general method of development was to sink shafts or pits 25 to 86 feet deep at the edge of the cliff under the mills, taking water from the canal to drive turbines at the bottom of the pits, allowing the used water

to escape through short tunnels emerging part way down the cliff. Power was transmitted by vertical shafts to the mills above ground.

An event of interest, in view of the later developments of electrical power, was the installation in 1879, in the mill now operated by the Cliff Paper Company, of a dynamo requiring about 36 horsepower for generating electric current for arc lights in Prospect Park.

In 1881 the Niagara Falls Hydraulic Power and Manufacturing Company constructed its Station No. 1 in which were installed dynamos having a total output of 2,000 horse power, for supplying electrical power for commercial purposes. This station has since been abandoned.

In 1895, the Niagara Falls Hydraulic Power and Manufacturing Company began the construction of its Station No. 2, see Exhibit "F", sheet #3, which station utilized the entire available head between the canal and the pool next below the Falls, namely, about 210 feet. Station No. 2 containing 16 turbines with a total output of 34,000 horse power was completed in 1903. Part of this station has since been abandoned, penstock No. 1 with generator units connected thereto having been dismantled, leaving two penstocks with nine units of a total capacity of 23,600 horse power. Of that amount only about 13,000 has been normally utilized since the completion of Station No. 3 Extension referred to below.

Excavation for Station No. 3 containing 13—10,000 horse power hydro-electric generating units was begun in 1903 and the station was completed in 1914.

The Niagara Falls Hydraulic Power and Manufacturing Company was succeeded by the Hydraulic Power Company of Niagara Falls, which was incorporated March 28, 1910.

Station No. 3 Extension, containing three units having a nominal combined output of 100,000 horse power was begun by the Hydraulic Power Company in 1918 before the consolidation and completed by The Niagara Falls Power Company in 1920.

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From time to time as the various generating stations have been constructed, the Hydraulic Canal has been widened and deepened until now it is approximately 100 feet wide by 14 to 20 feet deep. Similarly the intake from the Niagara River at Port Day has been improved.

The business of the Hydraulic Power Company and its predecessors was the leasing or sale of water from its canal, or of mechanical power at the shafts of its water wheels. Prior to the incorporation of the Cliff Electrical Distributing Company, hereinafter referred to, some electrical power was delivered to mills adjacent to the generating stations, but the bulk was sold as mechanical power at the turbine shafts.

Cliff Electrical Distributing Company

The Cliff Electrical Distributing Company (hereinafter called the Cliff Company) was incorporated March 15, 1909. It purchased all of the electrical generating and distributing facilities of the Hydraulic Company and from time to time added to its generating and distributing system. On October 31st, 1918, it was selling and distributing approximately 80,000 horse power to customers in Niagara Falls, N. Y.

The Niagara Falls Power Company (Constituent)

The Niagara Company was organized in 1886 and by July 1st of that year had prepared and issued a formal plan of development, the essential features of which were the acquisition of lands along the Niagara River about a mile and a third above the Falls, the construction of a canal or head race through its lands, a tunnel tail race parallel to and below the level of the canal for the purpose of conducting water discharged from wheels located in deep wheelpits to be excavated under mill sites located along the head race, to the pool next below the Falls. One of the features of the plan, considered at that time of prime importance, was the avoidance of intrusion upon the scenic zone near the Falls as the mills would be a mile or more distant therefrom.

Negotiations for the conduct of the work were instituted and conducted both in England and America, but without satisfactory results, until July 5, 1889, the Company entered into a contract with the Cataract Construction Company of New Jersey to construct its work, which contract was subsequently amended and extended.

To obtain the very best results and the widest and most recent information concerning power transmission, an International Commission was established in London in June 1890. Competitive plans were received from twenty carefully selected designers, manufacturers and users of power in England and the continent of Europe, and also in America. Upon the basis of the information elicited through the Commission and the experience of those investigating the subject in behalf of the Niagara Company, it became clear that concurrently with the development of the water power the Company could proceed with the development of a successful system of transmitting and applying power.

Rights for the development of not more than 200,000 horse power were granted by the Legislature of the State of New York and a definite plan for the development of that amount of power was adopted. By April 27, 1891 lands to the amount of 1,486 acres had been purchased, 400 acres of which were reserved for an industrial village. At about this time rights of way for two tail race tunnels, each to be of 100,000 horse power capacity had been acquired.

Actual construction work was begun on October 4, 1890 when ground was broken for the first tail race tunnel. The construction of an initial installation of three units of 5,000 horse power each proceeded forthwith, besides inlet canal and wheelpits for seven more 5,000 horse power units which were later installed and are now in operation in Power House No. 1, see Exhibit "F", sheet #7. A step-up transformer station and a 22,000 volt transmission line through Tonawanda to Buffalo, see Exhibit "E", sheet #1, were built at the same time as was also the industrial village of Echota, now part of the City of Niagara Falls.

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Electric power was first delivered commercially from Power House No. 1 to a tenant in Niagara Falls on August 26, 1895 and to Buffalo, November 15, 1896. Unit No. 10 was placed in service on May 24, 1900, marking the completion of Power House No. 1.

The construction of Power House No. 2, containing eleven 5,000 horse power units was begun February 12, 1900 and the first machine in it, Unit 11, was placed in commercial service on October 31, 1902, while the last, marking the completion of Power House No. 2, was in service March 16, 1904.

Simultaneously with the construction of its generating plants the Niagara Company has provided transmission facilities for delivering electrical power to its customers in Niagara Falls, N. Y. and to Tonawanda and Buffalo.

The Niagara Company followed a consistent plan from the start for the development of 200,000 horse power but was halted after one half of that amount was in service by the enactment of the so called Burton Act, approved June 29, 1906.

The records in respect to the financing from 1853 to 1878 are to a large extent unavailable, except that it is generally known that very large sums of money were expended directly upon the construction of the hydraulic canal and that the enterprise was then wholly unprofitable. Subsequent financing has been by the sale of bonds and stock for cash and the use of the cash in construction work and in some instances by the issuance of bonds and stock in payment for construction work, as well as the use of surplus earnings for additions and betterments.

The foregoing statement is a part of the Application for License made by the undersigned this 3rd day of January, 1921.

THE NIAGARA FALLS POWER COMPANY

By .....
President.

EXTRACTS FROM THE RECORD AND BRIEFS IN INTERNATIONAL PAPER COMPANY v. UNITED STATES, 68 CT. CLS. 414, 282 U. S. 399.

(Officially Noticed, Tr. 200, A. 147-148)

[fol. 1]* IN COURT OF CLAIMS OF THE UNITED STATES

No. C-668

INTERNATIONAL PAPER COMPANY

v.

THE UNITED STATES

* * * * * * * * * * *

Amended Petition—Filed August 8, 1927.

To the Honorable the Court of Claims of the United States:

The claimant, International Paper Company, respectfully represents:

1. The claimant is, and has been continuously for a period preceding the occurrence of all matters hereinafter set forth, a corporation created, organized and doing business under the laws of the State of New York, with its principal place of business at Corinth, Saratoga County, New York, and is and has been engaged in the business of manufacturing, purchasing, selling and dealing in
6 paper and any and all products and compounds thereof, and materials used in connection with such manufacture, including the manufacture of wood pulp and other fibres.

2. In carrying on its business, your claimant operates a number of paper mills located in several of the Eastern States of the United States, including among others, a paper mill at Niagara Falls, New York, hereinafter some-

* The folio references "[fol. 1]", etc., appearing at pages 480 to 530 hereof, reproduce the folio references to the Transcript of Record of the Court of Claims.

The indented folio references appearing at pages 480 to 530 hereof are references to the pages of the Petition and Transcript of Record filed January 29, 1930, in the Supreme Court of the United States.

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times [fol. 2] referred to as "Niagara Falls Mill." The plant of the Niagara Falls Mill is located on the American side of the Niagara River about one mile above the Falls of Niagara, within the city limits of the City of Niagara Falls, Niagara County, New York.

3. At the time the events occurred which constitute the basis for this claim, the Niagara Falls Mill was engaged in the production of paper pulp and other constituent pulps and the manufacture therefrom of news print paper for sale to various newspapers and users of news print paper throughout the United States. It operated six water wheels in the development of water power used in its manufacturing operations. These wheels were operated by water taken from the so-called "power canal" of The Niagara Falls Power Company (a power company located adjacent to and directly above the Niagara Falls Mill on the bank of the Niagara River), at an intake point some 300 feet from the point where the power canal taps the Niagara River. The right to take and use this water in the development of water power arose under a series of deeds and leases executed by The Niagara Falls Power Company as more specifically set forth hereinafter. The water so taken from the power canal was carried in a branch canal to the wheel pits of the Niagara Falls Mill, and was thence discharged into a branch tunnel which joined below the main tailrace tunnel of The Niagara Falls Power Company's power canal, and eventually flowed again into the Niagara River below the Falls. The respective locations of the Niagara Falls Mill and the plants of The Niagara Falls Power Company, together with the method of intake and discharge of the water used by the Niagara Falls Mill in its manufacturing operations, are shown in a sketch attached hereto as "Exhibit A" [fol. 3] to this complaint and incorporated herein as part of this paragraph.

7 There was no other available source from which the International Paper Company could obtain water or water power for use in the operation of its Niagara Falls Mill except that described above.

4. The Niagara Falls Power Company is a corporation organized under the laws of the State of New York, with its principal place of business at Niagara Falls, New York. The plants of The Niagara Falls Power Company are located on the American side of the Niagara River, just above the Niagara Falls Mill of the International Paper Company, and separated from it by The Niagara Falls Power Company's power canal, which connects with the Niagara River, and by means of which The Niagara Falls Power Company takes water from the Niagara River for use in carrying on its business.

5. The Niagara Falls Power Company, as it exists at the present time was formed by the consolidation, effective October 31st, 1918, of The Niagara Falls Power Company (constituent), Hydraulic Power Company of Niagara Falls, and the Cliff Electrical Distributing Company. This consolidation was duly effected pursuant to Chapter 596 of the Laws of the State of New York of 1918, and was accomplished at the suggestion of the United States Government in order to conserve the water power resources at Niagara Falls. The present Niagara Falls Power Company succeeded to all the rights of the constituent Companies. The original Niagara Falls Power Company was the pioneer in the United States in hydro-electric development and electrical transmission. It was organized under Special Act of the Legislature of the State of New York in 1886 under the name of the Niagara River Hydraulic Tunnel Power [fol. 4] and Sewer Company of Niagara Falls. Its charter was amended from time to time by various special acts of the New York legislature and its amended charter authorized it, among other things, to take water from the Niagara River and to manufacture and distribute hydro-electric current and to lease water for water power purposes. It acquired lands bordering upon the shores of the Niagara River, both above and below Niagara Falls, including the land noted upon the sketch attached hereto as "Exhibit A," constructed its plant, and took and used

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water for power development from the Niagara
8 River under authority of (1) conveyances from the original riparian owners under patents from the State of New York, (2) grants from the State of New York of land under the waters of the Niagara River adjoining the uplands of the Company at the intake of its canal, (3) various Special Acts of the Legislature of the State of New York, and finally, (4) licenses duly issued by the Federal Government, which licenses were renewed from time to time by the appropriate Department of the United States.

6. Sometime about 1903 or 1904, an International Water Ways Commission, composed of three representatives of the United States, and three representatives of the Dominion of Canada, was created. On or about March 19th, 1906, the American Commissioners made a report in which they recommended that the amount of water diverted on the American side should be limited to 18,500 cubic feet per second (C. F. P. S.), and that permits should be granted as follows:

To The Niagara Falls Power Company..	8,600 C. F. P. S.
To the Niagara Falls Hydraulic Power & Manufacturing Company, the predecessor [fol. 5] of the Hydraulic Power Company of Niagara Falls.....	9,500 C. F. P. S.
To the Erie Canal and its tenants.....	400 C. F. P. S.
Total	18,500 C. F. P. S.

The volume of water in cubic feet per second is roughly reducible to water horse power by multiplying the cubic feet per second by the fall in feet and then by multiplying the product by one of the following fractions, 0.1134, 0.091, 0.085 or 0.079, according as the efficiency is 100%, 80%, 75%, or 70%, respectively. Thus, the 8,600 C. F. P. S. allocated to The Niagara Falls Power Company, as noted above, with its approximate fall of 135 feet and an approxi-

mate efficiency of 75% was equivalent to about 98,685 water horse power. Conversely, the water horse power is roughly reducible to C. F. P. S. in approximate figures by multiplying the horse power by the figure 8.81, 11.00, 11.73 or 12.59, according as the efficiency is 100%, 80%, 75% or 70%, respectively, and by dividing the product by the fall of water in feet.

9 7. Upon the transmission of the aforesaid report to Congress, a law was enacted known as the Burton Law, approved June 29th, 1905 (34 Stat. L. 626) which authorized the Secretary of War to grant permits for the diverson of 15,600 C. F. P. S. from theNiagara River. Pursuant to this statute, the Secretary of War duly issued the following permits:

To The Niagara Falls Power Company..	8,600 C. F. P. S.
To the Niagara Falls Hydraulic Power & Manufacturing Company	6,500 C. F. P. S.
[fol. 6] To the Erie Canal and its tenants	500 C. F. P. S.
Total	15,600 C. F. P. S.

These permits were extended from time to time by the Secretary of War under the provisions of several successive joint resolutions of Congress, and for a number of years these limitations upon the amount of water used were continued.

8. In the meantime, however, pursuant to the report of the International Waterways Commission, steps were taken looking toward a treaty between the United States Government and the British Government with regard to the diversion of water from the Niagara River. Such a treaty was finally entered into, and was promulgated in May, 1910. This treaty provided that the United States might authorize the diversion for power purposes of an amount of water not exceeding in the aggregate a daily diversion at the rate of 20,000 C. F. P. S., and the British Government might authorize the diversion of water for power purposes not exceeding in the aggregate a daily diversion at the rate of

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36,000 C. F. P. S. Notwithstanding the provisions of this treaty, however, the amount of water which the American companies were authorized to divert was limited, as noted above, to 15,600 C. F. P. S. until the beginning of the World War. In the spring of 1918, however, the demand for power becoming acute, the Federal Government authorized by license The Niagara Falls Power Company and the Hydraulic Power Company of Niagara Falls, and, subsequently, the consolidated company, the new Niagara Falls Power Company, to divert 19,500 C. F. P. S. from the Niagara River, the remaining 500 C. F. P. S. being allotted to the Erie canal and its tenants at Lockport, New York. This allocation of the water has continued from that time [fol. 7] until the present.

9. There has never been a time within the period covered by the matters presented in this complaint during which The Niagara Falls Power Company, or its constituent, The Niagara Falls Power Company, has not been fully authorized both by the State of New York and by the Federal Government (as and when the Federal Government has undertaken to regulate the amount of water which might be diverted from the Niagara River) to divert and take water from the Niagara River in an amount which it has diverted and taken.

10. The rights of the International Paper Company to take and use water from the power canal of The Niagara Falls Power Company for the operation of its Niagara Falls Mill were created under a series of deeds, leases and agreements as follows: By deed dated March 7th, 1896, duly recorded in the County Clerk's Office of Niagara County, N. Y., The Niagara Falls Power Company, the constituent of the present Niagara Falls Power Company and at that time the owner of the entire tract of land in the City of Niagara Falls now the site of the present Niagara Falls Power Company's plant and the Niagara Falls Mill of the International Paper Company, conveyed to the Niagara Falls Paper Company, a corporation organized under the laws of Illinois and authorized to do business in the State

of New York, certain described land and land under water in the City of Niagara Falls which at present constitutes the site of the Niagara Falls Mill of the International Paper Company, together with the right "to take, use and develop water and water power to the extent of 3,000 horse power" forever. The grant was in fee simple, subject to [fol. 8] the reservations contained in the deed, including the payment of $24,000 as an annual rental for the right to take and use the 3,000 horse power as described in the said deed. The Power Company covenanted that it was lawfully seized of the land in question and had good right to convey and "that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and
11 that the party of the second part (the Paper Company) on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have and hold the said premises forever." The Power Company further agreed to furnish and maintain for use of the Paper Company during twenty-four hours every day a full and sufficient right and opportunity to take water from the Niagara River at a point opposite the premises granted, or, at the option of the Paper Company, from the main canal of the Power Company at a designated point, and to discharge into the main tailrace of the Power Company through the branch tailrace of the Power Company an amount of water held to be equivalent to 3,000 horse power, as described in the deed. A copy of the said deed of March 7th, 1896, is attached hereto as "Exhibit B" and made a part of this paragraph as if fully incorporated herein.

11. On the same day upon which the aforementioned deed was executed, namely, March 7th, 1896, The Niagara Falls Power Company entered into a lease with the Niagara Falls Paper Company, a copy of which lease is attached hereto as "Exhibit C" and made a part of this paragraph as if fully incorporated herein, in which The Niagara Falls Power Company, after reciting the execution of the afore-

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mentioned deed and that the Niagara Falls Paper Company desired to obtain water power in addition to that to be [fol. 9] developed under the terms of the aforesaid deed, agreed to permit the Paper Company, its successors and assigns, from a date not later than October 1st, 1896, and for a period of ten years thereafter, with the right to the Paper Company, at its option, to obtain one or more additional terms of ten years each, extending, however, not later than January 1st, 1936, to take and discharge through The Niagara Falls Power Company's main tunnel, water from the main canal of The Niagara Falls Power Company, or from the Niagara River, sufficient to develop 2900 horse power in addition to the 3000 horse power described in the deed of even date, as more specifically set forth in the lease in question and, in addition, it was agreed that the Niagara Falls Paper Company should have the right, on ten days' written notice to The Niagara Falls Power Company,
12 to take, use and discharge additional water sufficient to develop blocks of not less than 500 horse power up to the full amount of the capacity of the discharge tunnel leading from the bottom of the Paper Company's wheel pit to the main tunnel of The Niagara Falls Power Company; it was further stipulated that the Niagara Falls Paper Company should pay $29,000 a year as an annual rental for the aforesaid 2900 horse power, and should pay for the additional right to take and use water power in blocks of 500 horse power at the rate of $10 per horse power per annum.

12. By deed dated January 31st, 1898, duly recorded in the County Clerk's Office of Niagara County, N. Y., the International Paper Company acquired all the right, title and interest of the Niagara Falls Paper Company in its land and water rights, including the rights of the Niagara Falls Paper Company acquired from The Niagara Falls Power Company under the aforesaid deed and lease, both dated [fol. 10] March 7th, 1896. A copy of this deed of assignment is attached hereto marked "Exhibit D" and made a part of this paragraph as if fully incorporated herein.

13. By agreement dated June 1st, 1898, between The Niagara Falls Power Company and the International Paper Company, duly recorded in the County Clerk's Office of Niagara County, N. Y., The Niagara Falls Power Company, after reciting the deed and lease with the Niagara Falls Paper Company of March 7th, 1896, and the rights acquired by the Niagara Falls Paper Company thereunder, and after reciting the assignment by the Niagara Falls Paper Company to the International Paper Company of the lands and water rights acquired thereunder, consented to the transfer and assignment to the International Paper Company of the said deed and agreement, and confirmed the grants, rights and agreements so transferred and assigned to the International Paper Company, and agreed with the International Paper Company faithfully to fulfill and carry out the said agreement with the same force and effect as if the said deed and agreement originally had been made with the International Paper Company instead of with the Niagara Falls Paper Company the International Paper Company on its part assumed all the obligations contained in the said deed and in the said agreement,
13 dated March 7th, 1896, and covenanted faithfully to fulfill and carry out the same. A copy of this agreement is attached hereto marked "Exhibit E" and made a part of this paragraph as if fully incorporated herein.

14. Pursuant to these several deeds and leases the International Paper Company, since January 1st, 1898, has had the right to take water and in fact since that time until on [fol. 11] or about February 7, 1918, did take water from the main power canal of The Niagara Falls Power Company at the point of intake shown on the sketch attached as "Exhibit A" equivalent approximately to 725 C. F. P. S., which amount was sufficient to produce 8,156.25 horse power as computed under the aforesaid deeds and leases, for which power it has paid to The Niagara Falls Power Company an annual rental of $75,562.50 per year. The water so taken was used to develop power necessary to operate your claimant's Niagara Falls Mill, which had a normal

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daily capacity of 154 tons of news print paper and was operating upon that basis when the following events occurred.

15. On or about December 20, 1917, the International Paper Company was notified by the United States Government that the Government proposed to requisition, for war purposes, the water which the Niagara Falls Mill was taking from the power canal of The Niagara Falls Power Company, and consequently it would be necessary that the supply of water so taken be shut off and the use thereof discontinued. The International Paper Company was informed, however, that sufficient time would be allowed it in which to complete the manufacture of such material as it then had in its Niagara Falls Mill before the shutdown should be effective. Pursuant to these orders, early in January, 1918, two wheels of the Niagara Falls Mill were shut down, and shortly thereafter two more wheels were stopped, and on or about twelve-thirty A. M., February 7th, 1918, the entire amount of water was shut off and the mill closed. Thereupon the United States, acting under and pursuant to its governmental powers, did take and use for purposes of its own, during the period from February 7th, 1918, until November 30th, 1918, without making any

14 com [fol. 12] pensation therefor, the water and water rights to which the International Paper Company was entitled under and by virtue of the deeds and conveyances hereinabove set forth.

16. Your claimant did not voluntarily relinquish its rights to the water and water rights so taken; on the contrary, at the time of such taking it made demand for just compensation therefor. Nevertheless, the United States has failed and refused to make any compensation for the aforesaid taking notwithstanding that your claimant is entitled to just compensation under the provisions of the 5th Amendment to the Constitution of the United States.

17. Your claimant alleges that the rights which it acquired to take water from the power canal of The Niagara

Falls Power Company were property rights within the meaning of the 5th Amendment to the Constitution of the United States; that the United States deprived your claimant of such property rights and by so doing became obligated to make just compensation therefor; that the United States has, nevertheless, failed and refused to make any compensation; and that by virtue of the aforesaid taking of its property without compensation, your claimant has been damaged to the extent of $590,732.20, with interest at 6% per annum until paid, which amount your claimant hereby claims.

18. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim or any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant is a citizen of the United States and [fols. 13 & 14] has at all times borne true allegiance to the Government thereof and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true, and the claimant
15 claims $590,732.20 with interest at 6% per annum until paid and prays judgment therefor.

Stetson, Jennings & Russell, Attorneys for Claimant, Office and Post Office address: 15 Broad Street, Borough of Manhattan, New York City. John W. Davis, of Counsel.

Duly sworn to by Allen Curtis. Jurat omitted in printing.

(Here follows Exhibit A to Amended Petition, side folio 14-a)

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FOLDOUTS TOO LARGE FOR FILMING

[fol. 15] EXHIBIT B TO AMENDED PETITION

This indenture, made the Seventh day of March, 1896, between The Niagara Falls Power Company, a corporation organized and existing under the laws of the State of New York (hereinafter called "Niagara Company"), party of the first part, and Niagara Falls Paper Company, a corporation organized and existing under the laws of the State of Illinois, and authorized to do business in the State of New York (hereinafter called the "Paper Company"), party of the second part.

Witnesseth, That the said party of the first part in consideration of the agreements and covenants hereinafter contained to be kept and performed by the party of the second part and of the sum of One Dollar, lawful money of the United States, paid by the party of the second part, the receipt whereof is hereby acknowledged, and of other good and sufficient consideration it thereunto moving does hereby grant and release unto the said party of the second part, its successors and assigns for ever.

All that certain lot, piece or parcel of land and land unlaim or any part thereof or interest therein has been made. and State of New York, being a part of lot number eleven, Steadman Farm (so called), more particularly described as follows:

16 Beginning at a point in the southerly line of Buffalo Street where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so called), running thence South eighty-eight (88) degrees and forty (40) minutes East magnetic, along said southerly line of Buffalo Street, seven hundred and ninety-three and three-tenths (793.3) feet to a stone monument set in said southerly line; thence South four (4) degrees and sixteen (16) minutes [fol. 16] West magnetic six hundred and eighty-seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the

Niagara River; thence by curve to the Southwest with radius of one hundred (100) feet one hundred and ninety-five and five-tenths feet (195.5 ft.); thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes East magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hundredths (11.75) acres of land and land under water, more or less; together with three thousand horse power, such as are hereinafter described, to be used as prescribed in the conditions and covenants hereinafter set forth, with all the privileges and appurtenances to the same belonging; the following being a plan of such demised premises showing the point of water intake, wheel pit, discharge tunnel and other appurtenances:

(Here follows plan, side folio 17)

[fol. 18] Being the same premises heretofore demised by the party of the first part to the party of the second part, by a certain indenture of lease, dated September 1st, 1891, and recorded in Niagara County Clerk's Office October 13th, 1891, in Liber 209 of Deeds, at page 364;

Excepting and reserving therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo Street, and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls
17 Power Company by deed dated June 11, 1892, and recorded in the Niagara County Clerk's Office June 29th, 1892, in Liber 265, at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's Office, June 11th, 1892;

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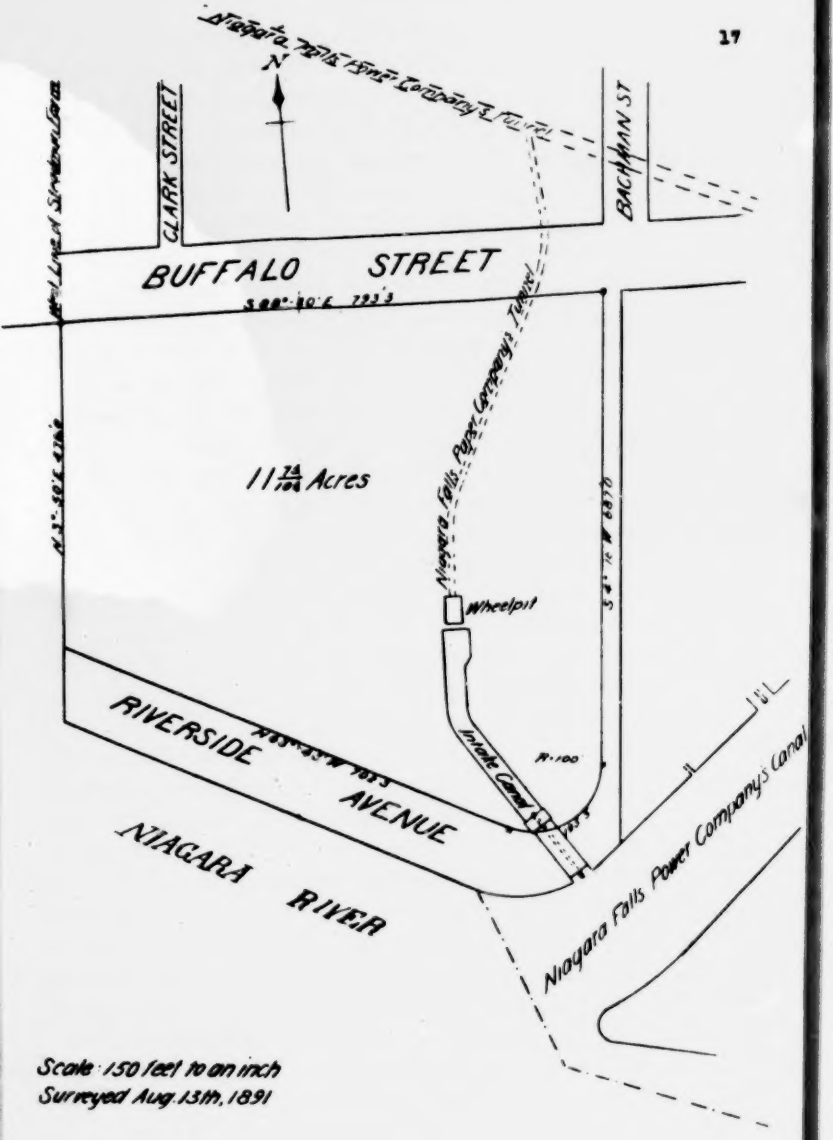
17
N
Niagara Falls Power Company's Tunnel
CLARK STREET
BACHMAN ST
BUFFALO STREET
S 88° 30' E 722.3
N 1° 30' E 418'
11 74/100 Acres
Niagara Falls Power Company's Tunnel
S 1° 30' W 837'
Wheelpit
Intake Canal
N. 100
RIVERSIDE AVENUE
S 88° 30' W 783'
NIAGARA RIVER
Niagara Falls Power Company's Canal
Scale: 150 feet to an inch
Surveyed Aug. 13th, 1891

1140

And also excepting and reserving therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Paper Company to connect with the main tunnel of the Niagara Company, in which branch tunnel, however, the Paper Company, its successors and assigns shall have the sole right of exclusive use for its and their own purposes, so long as it and they shall continue to pay the rental hereinafter specified for the right to take, use and develop water and water power to the extent of Three thousand (3,000) Horse Power, and all other conduits, sluiceways, wheel pits and tunnels of the Niagara Company.

To have and to hold the above granted premises to the said party of the second part, its successors and assigns, forever, but nevertheless (and this grant not being intended to prevail against any provision hereinafter contained, [fol. 19] though apparently in some degree repugnant thereto) subject to the reservations and to the agreements, terms and conditions and all other matters and things hereinafter set forth as obligatory upon the party of the second part, and among other things, to the payment of the said Niagara Company, its successors and assigns, as an annual rental for the right to take, develop and use upon the premises hereby granted, water and water power sufficient to produce Three thousand (3,000) Horse Power as hereinafter defined, of Twenty-four thousand Dollars in gold coin of the United States of the standard of weight and fineness of the year 1890, or the equivalent of this commodity in United States currency, at the option of the party of the first part, payable in equal quarterly installments; payment of Six Thousand Dollars in gold coin, such as specified, or its equivalent as specified, to be made on the thirtieth day of June, 1896, and a like payment to be made every three months thereafter, viz: on the last day of every March, June, September and December in each year thereafter.

The Niagara Company, for itself, its successors and assigns, covenants with the said party of the second
18 part, its successors and assigns, that the said Niagara Company is lawfully seized in fee of the above

granted land; that it has good right to convey the same as aforesaid; that the same excepting as hereinafter mentioned, is free of all incumbrances; that the party of the first part will execute or procure any further necessary assurance of the title to said premises; and that it will warrant and defend the same and the estate therein as hereby conveyed against the lawful claims and demands of all persons; and that said power hereby agreed to be taken and paid for shall be maintained as hereinafter provided, and that the party of the second [fol. 20] part, on paying the said yearly rental for power, and performing the covenants and conditions herein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever.

The Niagara Company reserves, however, unto itself, its successors and assigns, the right, at all reasonable times, to enter into and upon the demised premises, for the purpose of inspecting or repairing any canals, tunnels, water courses, waterways, or other appurtenances belonging to it or connected with its works, and of removing obstructions therein, as well as to measure and compare the quantity of water used and wasted, or suffered to flow out and waste, with the quantity hereby granted.

The Niagara Company further reserves to itself, its successors and assigns (this reservation being a limitation and condition of this conveyance) a right, privilege and easement (subject to the lien of the mortgage or deed of trust hereinafter mentioned), to construct, establish and maintain upon, through or under said lands without unnecessarily impairing the use and enjoyment thereof by the grantee thereof, any tunnels, conduits, sluiceways, pipes for air, water, gas, or sewers, wires or machinery for the creation and transmission, distribution and application of power, heat or light created by or through the use or operation of any tunnel of the Niagara Company or of any extension thereof, together with any reasonable and proper highways and tracks, switches and sidings for a terminal railroad; provided that no such reserved right shall be exercised without subsequent fair and reasonable compensa-

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tion to the grantee for any damage done by reason of the exercise of such right, privilege or easement. Such
19 compensation shall be ascertained and fixed by arbitration in [fol. 21] the manner hereinafter provided.

The Paper Company, for itself, its successors and assigns, hereby covenants with the Niagara Company that it and they will keep, fulfill and observe, all and singular the covenants, stipulations and conditions herein contained or referred to on its or their part to be kept, performed and fulfilled; and that it will pay, or cause to be paid, the rent for water power hereinbefore reserved to be paid at the times and in the manner hereinbefore mentioned; and it is further expressly covenanted and agreed as an express condition upon which this conveyance is made and accepted, that neither the Paper Company, its successors or assigns, nor any one acting or claiming under it or them, shall at any time or in any manner construct, or maintain or operate, on or under the granted premises, any tunnel, canal or other appliance, for the production of light, heat or power, by the use of the water of the Niagara River, except from time to time by express agreement with and consent in writing of the party of the first part, based on a resolution of its Board of Directors in terms authorizing such consent, and that in the event of any violation of this covenant and condition, the premises herein granted shall revert to the party of the first part, its successors or assigns.

This Conveyance is made and accepted upon the following further conditions and covenants, to wit:

Article I. The said premises shall be used by the Paper Company, its successors or assigns, for the purposes of its various manufacturers (without nuisance) as hereinafter provided.

[fol. 22] Article II. Niagara Company shall furnish and maintain for use of Paper Company during twenty-four hours of every day of the year (excepting Sundays and holidays and not more than ten other days in every year; on all of which days, however, Paper Company may use

the power without further charge, if Niagara Company shall not shut the same off for purposes of maintenance or repair; rent to be waived for any other days of suspension) a full and sufficient right and opportunity (always excepting any interference from ice) to take water from the Niagara River at a point opposite the granted premises or at the option of Paper Company, from the main canal of Niagara Company at the point shown on the plan, and to discharge into the main tailrace or tunnel of Niagara Company through the branch tail race constructed by Paper Company, and in conformity to the plans of Niagara Company's Engineers and to their decision 300 cubic feet of water per second when the fall available on said property shall be 120 feet and a quantity inversely proportionate to this fall of 120 feet if the said available fall be more or less than 120 feet (such 300 cubic feet per second being herein held to be the equivalent of Three thousand (3,000) horse power on the shaft); such water so discharged to be continuously carried away as aforesaid through the main tunnel of Niagara Company at its expense.

Article III. For the purpose of ascertaining the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal or canals of the Niagara Company, through the granted premises or into the tunnel of the Niagara Company by the Paper Company, its successors and assigns, the Niagara Company reserves the right, from time to time as it may desire by its duly authorized agent, hydraulic engineer or other employee, and with the necessary workmen or assistants, to enter upon the granted [fol. 23] premises, to measure and compare the quantity of water drawn or suffered to flow upon or through the said premises, with the quantity granted, and may also adopt and use such other mode of making or of verifying the said measurements as the circumstances of the case may require; and the Paper Company shall at all times furnish all reasonable facilities to said employees and assistants in

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thus ascertaining the quantities of water drawn, or discharged, as aforesaid.

Article IV. The Niagara Company shall construct and keep in good repair its main tunnel, and from time to time, as occasion may require, shall remove and clear out obstructions that may accumulate therein, always excepting ice.

The head canals, penstocks, branch tailrace, tunnels, flumes, wheel rooms, wheel pits and other water connections shall be made, maintained and be kept in good repair by the Paper Company, and the water intake joined to the Niagara River or to the Niagara Company's water course shall be maintained by the Paper Company in a durable, substantial and water tight manner. The Paper Company shall also maintain a good and substantial stop gate at the head of each water intake, that shall be so constructed that when requisite it may be closed, whether the water be then passing through the intake or not, and that when closed it will shut out the water from the said intake. The Paper Company's penstocks, flumes, wheel rooms, and other water connections shall be so constructed and maintained that the water may be shut out from them without injury to them.

21

All the work contemplated in this article shall be done and maintained according to plans bearing the approval of and in manner satisfactory to the Engineers of the Niagara Company.

[fol. 24] Article V. If the Paper Company shall sustain any injury to its water privilege, happening from the willful neglect or misconduct of the Niagara Company the rent reserved for water and water power, for so much of the right or privilege injured may cease during the time such injury shall continue, but no longer.

Article VI. The Paper Company shall not use more water than granted, or otherwise contracted for with Niagara Company, nor waste it, nor permit it to be wasted for want of repair, or through the deficiency of its works or other-

wise; and if so wasted or if more be used than is granted, the Niagara Company may stop the water from entering the flumes by closing, locking and sealing the gates across them, or by any other method, until such waste or excessive use be sufficiently guarded against.

Article VII. All buildings erected upon the granted premises more than ten feet in height shall be of stone or brick, the roofs covered with slate or some incombustible material, and the covings well secured against fire; and if any other be erected the Niagara Company or its assigns may enter and abate them, and have any other appropriate remedy.

Article VIII. The granted premises shall be held, used and improved for mills, manufactories or buildings appurtenant thereto, or for such dwelling houses,
22 boarding houses, sheds and other outhouses as shall be required for the accommodation of the owners, agents, clerks, overseers, machinists, watchmen or operatives employed in such mills, and shall not be appropriated to any other purpose whatever, nor transferred, sold or alienated, except subject to all the conditions and restrictions of this conveyance.

Article IX. The Paper Company shall not use any build-
[fol. 25] ing for any purpose, nor set up or continue any laboratory, powder mill, furnace or forge, or any chemical or other works whatever, which may be so noxious or dangerous, from fire or otherwise, as to impair, injure or endanger the life, safety, health or reasonable comfort of any person living and employed in and about the land or works of the Niagara Company, or which shall endanger any buildings, property or works placed by the Niagara Company, or others, upon lands owned, granted or demised by the Niagara Company. In case any such prohibited works shall be set up, continued or used, the Niagara Company may take judicial proceedings to abate them, and also may sue for damages, and may stop the water as above mentioned from passing into the flumes or canals of the Paper

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Company, until such prohibited works be removed or discontinued.

Neither shall the Niagara Company set up, continue or use any such prohibited works on its lands so near that of the Paper Company as to cause the above described mischiefs, or either of them; and should any such prohibited works be set up, continued or used by the Niagara Company, the Paper Company may take judicial proceedings to abate the same.

Provided, however, that the foregoing agreement to prevent nuisances is not to be understood to prevent any party from building, using and maintaining machine shops, with the smith's forges hammers and other things necessary and pertaining thereto, for making all kinds of machinery, nor to prohibit any party from setting up, using, enlarging or improving any establishment for bleaching, dyeing, coloring or printing goods, with all things necessary therefor (excepting dangerous or noxious works as aforesaid), and no party shall have the right to object to the use of any building for the purposes for which it has been used
23 before or at the time of the acquisition of his or its rights, or to [fol. 26] object to any building previously erected, on account of the materials of which it is composed or the manner in which it may be built.

The granted premises and all works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the works of the Niagara Company, and especially any and all obstruction or pollution of the water of the Niagara River, from which, near Grass Island the Niagara Company intends to draw water for domestic and other purposes.

Article X. The granted premises and the works thereon shall be so constructed, maintained and operated as to avoid any and all detriment to the use and operation of the Hydraulic Canal of the Niagara Falls Hydraulic Power and Manufacturing Company, as provided in an agreement between that Company and the Niagara Company, dated

the 30th day of December, 1889, and recorded in the office of the Clerk of Niagara County on the 18th day of January, 1890, in Liber 198 of Deeds, at page 9, as amended by a modifying agreement between the same parties dated January 27th, 1896, and recorded in the said office of the Clerk of Niagara County.

Article XI. The respective successors or assigns of the parties are declared to be entitled to all the rights, advantages and forfeitures, and bound by all the obligations, duties and conditions of, and remedies against, their original parties respectively, as herein set forth, unless otherwise expressed.

Article XII. The Niagara Company reserves the right to draw off the water from the canals, or tunnels, or of closing the same temporarily, for the purpose of clearing out or removing obstructions therein, or of repairing the same, and also, whatever necessary, for the purposes of prosecut- [fol. 27] ing and continuing the operations of the Niagara Company, its successors and assigns, in the building of mills and constructing the waterworks connected therewith, in the way usually done in similar cases, and with as little interruption in the use of water power as the circumstances and nature of the case may permit.

24 Article XIII. The Power to be developed as aforesaid shall not be used elsewhere than on the granted premises, nor shall it be let or assigned on said premises to any other person at any price less than that which at the time may be charged by the Niagara Company for similar blocks of power for similar purposes; but no such transfer shall release any party claiming hereunder from any obligations of this grant, unless nor until such transfer shall have been approved and such transfer accepted by written instrument executed by the Niagara Company (with the approval of the Trustee under said mortgage), specifying the fact and extent of such release.

Article XIV. The Paper Company shall have in all roads surrounding the said premises the same rights as any and

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all other takers of power from the Niagara Company, which, however, does not hereby covenant or agree to construct or provide any roads other than those now in existence. The Paper Company shall also have the right to cross the outer road or riverway, with a canal, over which it shall construct and maintain a sufficient bridge, and also have the right of dockage in front of the granted premises and along the said outer road.

Article XV. This conveyance and agreement is in all respects subject to the reservations, limitations and conditions contained in a certain mortgage or deed of trust made by the Niagara Falls Power Company to the Central Trust [fol. 28] Company of New York, as Trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29, 1891, and was recorded in the Niagara County Clerk's Office, April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office, July 14th, 1891, in Liber 211 of Mortgages, at page 549.

Article XVI. The Paper Company shall pay all the rents herein reserved for the right to take, develop and use water and water power to the Niagara Company as herein provided, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured by the mortgage above mentioned and notice of such default shall have been received by the Paper Company; and in case of and after any such default and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereunder directly to the Trustee under said mortgage for the benefit of the bondholders.

Provided, however, and this grant is upon the express condition that (1) if it shall happen that the said rent, or any part thereof, shall not be paid on any day on which

the same ought to be paid as aforesaid; or (2) if it shall happen that the Paper Company, its successors or assigns, shall fail to keep or shall violate any other condition or covenant herein contained, then, and in every such event, such default or violation may be notified to the Paper Company or to its successors or assigns by the Niagara Company, or by the Trustee of the mortgage aforesaid, and if such default or violation shall continue for sixty days after [fol. 29] such notice thereof shall have been given either by mailing the same at the post office in Niagara Falls, or by posting the same in a conspicuous place upon the granted premises, then, and in every such event it shall and may be lawful to and for the Niagara Company, its successors and assigns, into the said granted premises or any part thereof in the name of the whole to re-enter and repossess, have and enjoy the same again as of their first and former estate and interest therein, anything herein contained to the contrary notwithstanding, and no waiver of any such right of re-entry at any time shall affect or waive any right to re-entry accruing subsequently to such waiver.

Whenever an arbitration shall become necessary under the provisions of this conveyance, the same shall be established and conducted as follows: The Niagara Company, its successor or assigns shall nominate one fit and impartial person, and the Paper Company, its successors or assigns shall nominate one other fit and impartial person, which nominations shall be made and signified in writing by each party to the other; and in default of such nomination by either party for the space of thirty days after request for such nomination shall have been duly communicated in writing to such party by the other party, the person who shall have been so nominated by the other party shall appoint and associate with himself one other fit
26 and impartial person; and if the persons so nominated or appointed shall differ in judgment as to the subject of decision by them, they shall appoint a fit and impartial person to be associated with them for such purpose,

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if they can agree on such person, or, if they cannot agree, then each of them shall nominate two fit and impartial persons, and from the names of the four persons so nominated that of one of them shall be drawn by lot, who shall be associated for [fol. 30] the purpose aforesaid with the said two persons previously so respectively nominated or appointed; and the decision under oath of any two of the three persons who shall be so nominated or appointed shall in all cases be binding and conclusive. If, after any nomination of an arbitrator as hereinbefore provided duly made, a person so nominated shall for any reason be unable or shall decline to serve as such arbitrator, or shall be objected to by any party, the party hereto so nominating the person so becoming unable or declining to serve, or being objected to by the other party, shall at his option have the right to substitute some fit and impartial person qualified as aforesaid as arbitrator in the place and stead of the person unable or declining to serve or being objected to, provided that no person chosen by the other two arbitrators or by lot as above contemplated shall be subject to such objection.

And inasmuch as this is and is intended to be the corporate obligation of the two parties hereto respectively, their successors and assigns, any and all individual liability of the stockholders and trustees and directors of either and each of the corporations parties hereto is hereby expressly waived, and no party or person claiming hereunder shall at any time or place allege or assert any such individual liability in respect of any obligation or default under this agreement, or any judgment thereon, and no recourse thereon shall be had against any such stockholder, trustee or director.

In witness whereof, the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its President
27 and its [fol. 31] corporate seal to be hereunto affixed

and attested by its Secretary, the day and year first above written.

Executed in two uniform originals.

The Niagara Falls Power Company, by Charles A. Sweet, Vice President. Attest: James S. Milner, Secretary. (Corporate Seal of the Niagara Falls Power Company.) Niagara Falls Paper Company, by John L. Norton. Attest: John C. Morgan, Secretary. (Corporate Seal of Niagara Falls Paper Company.)

STATE OF NEW YORK,
County of Erie, ss:

Be it remembered that on this seventh day of March, 1896, before me, the undersigned, a Notary Public in and for the County of Erie came Charles A. Sweet and James S. Milner, both of them known to me personally, and the said Sweet known to me to be Second Vice President, and the said Milner known to me to be the Secretary of the Niagara Falls Power Company, the corporation described in and which executed the foregoing lease as party of the first part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

[fol. 32] And the said James S. Milner, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Power Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by the authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Secretary of said Company; that he knows the said Charles A. Sweet, and knows him to be Second Vice President of said Company; that the signature of said Charles A. Sweet subscribed to the foregoing instrument is in the genuine handwriting of said Charles

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A. Sweet, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof I have hereunto set my hand and official seal the day and year first above written.

H. Schanzlin, Notary Public, Erie Co., N. Y.

28 STATE OF NEW YORK,
Erie County Clerk's Office, ss:

I, Frank B. Steele, Clerk of said County and of the Courts thereof, the same being Courts of Record, do hereby certify that H. Schanzlin whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was, at the time of taking such proof or acknowledgment, a Notary Public, in and for the said County, duly commissioned, sworn and authorized to take the same; and further, that I am well acquainted with his handwriting, and [fol. 33] verily believe that the signature to the said proof or acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Buffalo, this 9 day of April, A. D. 1896.

Frank B. Steele, Dp. Clerk. (Seal of County Clerk, Erie Co.)

Ack. of Notary

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this first day of April, 1896, before me, the undersigned, a notary public in and for the County of New York, came John L. Norton and John C. Morgan, both of them known to me personally, and the said Norton known to me to be the President and the said Mor-

gan known to me to be the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing lease as party of the second part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

And the said John C. Morgan, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Paper Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by authority of the Board of Directors of said Company, and that he signed his
29 name [fol. 34] thereto by like authority as Secretary of said Company; that he knows the said John L. Norton, and knows him to be President of said Company; that the signature of said John L. Norton subscribed to the foregoing instrument is in the genuine handwriting of said John L. Norton, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof I have hereunto set my hand and official seal the day and year first above written.

Wm. H. Bruder, Notary Public (201), N. Y. County.
(Notarial Seal.)

State of New York,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the City and County of New York,

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dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2 day of April, 1896.

Henry D. Purroy, Clerk. (Seal of County Clerk.)

[fol. 35] EXHIBIT C TO AMENDED PETITION

This Agreement, made this seventh day of March, 1896, between The Niagara Falls Power Company (hereinafter called "Niagara Company"), a corporation organized and existing under the Laws of the State of New York, party of the first part, and the Niagara Falls Paper Company (hereinafter called "Paper Company"), a corporation organized and existing under the Laws of the State of Illinois, party of the second part,

Witnesseth: That whereas the Niagara Company, by a deed of even date herewith, has conveyed to the Paper Company certain premises in the City of Niagara Falls under certain terms and conditions, as by reference to said deed will more fully appear, being the same premises described in an indenture of lease thereof made by said Niagara Company to said Paper Company, dated September 1st, 1891, and recorded October 13th, 1891, in Liber 209, of Deeds at page 364; and

Whereas by the terms of said conveyance the Niagara Company agrees to supply to the Paper Company the right to take, develop and use upon the premises therein granted water and water-power sufficient to produce Three thousand (3,000) Horse Power of the character and under the conditions set forth in said conveyance, for which said right

to take, develop and use water and water-power the Paper Company therein agrees to pay an annual rental fixed in said deed; and

Whereas the Paper Company desires to obtain from the Niagara Company the right to take, develop and use upon said premises water and water power additional to that to be developed under the terms of said conveyance, and to [fol. 36] pay for such right by way of rental for a term of years, and not as a condition of said conveyance, the Niagara Company being willing to comply with such desire and request of the Paper Company.

Now, therefore, In consideration of the premises and of the rents and agreements hereinafter reserved and contained on the part and in behalf of the Paper Company, its successors and assigns, to be paid, kept and performed, said Niagara Company has agreed, and by these presents hereby does agree upon the conditions hereinafter stated from a date not later than October 1st, 1896, and for a period of ten (10) years thereafter, with the right to the Paper Company at its option to one or more additional term or terms of ten (10) years each, extending not later than January 1st, 1936, (every such optional right of Paper Company to a further term to be dependent upon its exercise and notification of exercise of such right at some time during the ninth (9th) year of the next preceding
31 term), to permit the Paper Company, its successors and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of Niagara Company or from the Niagara River, (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water) sufficient to develop and to use upon said granted premises, when and as required for use upon the premises conveyed to the Paper Company, Twenty-nine hundred (2900) Horse Power, in addition to the Three thousand (3,000) Horse Power described by the above mentioned conveyance: the term Horse Power herein used be-

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ing understood to involve and consist of the right to draw, throughout the twenty-four hours of each day, and during the term of the agreement, (but excluding Sundays and legal holidays, on all of which days, however, the Paper Company may use the [fol. 37] power without further charge, if the Niagara Company shall not shut the same off for purposes of maintenance or repairs, rent to be waived for any other days of suspension), from the canal of the Niagara Company, at a point designated in the plan of the said granted premises, through the said granted premises, and to discharge into the main tail-race tunnel of the Niagara Company by way of the shaft and the branch tail-race (already constructed upon the granted premises), one tenth (1/10) of one cubic foot of water per second, when the total fall available to the Paper Company for power purposes adjacent to the granted premises is one hundred and twenty (120) feet, or a quantity per second inversely proportionate to the said available fall, when it is more or less than one hundred and twenty (120) feet, and in order to prevent disputes as to the power in the variations of the said available fall from changes of the level of the water surface in the Niagara River or in the main tail-race tunnel, or in both, it is understood and declared that the quantity of water per second shall be varied in inverse proportion to the variation of the said available fall; thus, on a fall of one hundred (100) feet, the flow of water constituting one horse power would be twelve one-hundredths (12/100) of a cubic foot per second.

It is understood and expected that the Paper Company will be able to take, use and discharge water as aforesaid on or before October 1st, 1896; from which date the Paper Company shall pay the rent reserved hereunder whether or not the right hereby demised shall or shall not be exercised by the Paper Company.

32

It is agreed that at any time during any term of this agreement, whether the first or any extended term thereunder, and after ten (10) days written notice to the Niag-

ara Company the Paper Company from time to time shall have [fol. 38] additional right to take, use and discharge more water sufficient to develop blocks of not less than Five hundred (500) Horse Power, and up to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Paper Company's wheel-pit to the main tunnel of the Niagara Company, which water and water power shall be measured in the manner above stated and during any and every term of this agreement, the Paper Company shall make payment of rental as hereinafter specified for the largest amount of water (not less than 5900 Horse Power) which it shall theretofore have called for and shall be entitled to take, use and discharge under and of its agreements with Niagara Company.

It is further agreed that all such water and water power shall be used and developed upon the premises conveyed in said deed of even date herewith, and shall not be used otherwise or elsewhere than is herein provided, the right to use and develop such water and water power may be sub-let or assigned for use upon said premises for any purposes not injurious to the Niagara Company, or to the lessees of adjoining property, the Directors of the Niagara Company to be sole judge upon the question of injury under the meaning of this contract; it being understood that the Paper Company intends to use such power for the purpose of manufacture of plup, paper and other paper products.

The Paper Company for itself, its successors and assigns hereby covenants that for the additional right to take, use, discharge and develop water and water power to be provided hereunder, it will, on the tenth day of the month succeeding the end of each quarter, make quarterly payments in gold of the present standard of weight and fineness, as follows:

[fol. 39] (1) The sum of Twenty-nine thousand ($29,000.00) Dollars per annum for the Twenty-nine hun-
33 dred (2900) Horse Power, to which it is first entitled hereunder, such payment to begin the first day of

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October, 1896, and being additional to its obligation to pay the sum of Twenty-four thousand ($24,000.00) Dollars per annum for the right to take, use, discharge and develop Three thousand (3,000) other Horse Power under said deed.

(2) For any additional right to take, use, discharge and develop water and water-power next called for, for use hereunder, in blocks of not less than Five hundred (500) Horse Power, up to the full capacity of the discharge tunnel on the Paper Company's lands, payment by the Paper Company shall be at the rate of Ten ($10) Dollars per Horse Power per annum, for and during every year after such right to take, use, discharge and develop water and water-power shall have been called for, whether such right shall or shall not actually be exercised by the Paper Company; it being understood and intended that the aggregate annual amount payable by the Paper Company, its successors and assigns, during the term of this agreement or any extended term for the right to take, use, discharge and develop water and water power shall never be less than the rental for the total amount of water and water-power up to that time called for at the rate here specified, whether such amount of power shall or shall not be actually used by the Paper Company, its successors or assigns.

It is agreed that the quantity of water drawn or suffered to flow out of the Niagara River, or out of the canal of the Niagara River, through the premises or into the tunnel of the Paper Company by the Niagara Company, its successors and assigns, shall be ascertained, measured and paid for as is provided in like regard in the conveyance of even date herewith from the Niagara Company to the [fol. 40] Paper Company, and hereinbefore referred to; and that all the conditions in respect of the delivery and use of the water to produce Three thousand (3,000) Horse Power provided to be paid for under the terms of said Conveyance shall apply to and govern the use of the additional Horse Power provided to be taken under this agreement, excepting that no failure by the Paper Company, its successors

and assigns, to pay the rents herein reserved for the
34 right to take, use, discharge and develop water and water power under this agreement shall constitute such a violation of the covenant of said conveyance in that regard as shall entitle the Niagara Company, its successors or assigns to enter and re-possess itself or themselves of the premises granted by said conveyance, so long as the conditions thereof shall be faithfully observed by the Paper Company, its successors and assigns.

This agreement is in all respects subject to the reservations, limitations and conditions, terms and provisions contained in a certain mortgage or deed of trust made by The Niagara Falls Power Company to the Central Trust Company of New York, as Trustee, as security for bonds to be issued thereunder, and particularly in Article III of said mortgage, which is dated April 29th, 1891, and was recorded in the Niagara County Clerk's Office April 30th, 1891, in Liber 211 of Mortgages, at page 363, and was confirmed by a supplementary mortgage dated June 29th, 1891, and recorded in Niagara County Clerk's Office July 14th, 1891, in Liber 211 of Mortgages, at page 529.

The Paper Company shall pay all the rents herein reserved to Niagara Company as herein provided during the original term or any extension thereof, until and unless default shall have been made by the Niagara Company in payment of some part of the principal or interest secured [fol. 41] by the mortgage above mentioned and notice of such default shall have been received by the Paper Company; and in case of, and after any such default, and so long as the same shall continue, then upon and after such notice shall have been received by it, the Paper Company shall punctually pay all rents accruing hereinunder directly to the Trustee under the said mortgage for the benefit of the bondholders.

In witness whereof the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested

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by its Secretary, and the party of the second part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, on the day and year first above written.

Executed in two uniform originals.

The Niagara Falls Power Company, by Charles A. Sweet, Vice-President. Attest: James S. Milner, Secretary. (Seal.) Niagara Falls Paper Company, by John L. Norton, President. Attest: John C. Morgan, Secretary.

STATE OF NEW YORK,
County of Erie, ss:

Be it remembered that on this seventh day of March, 1896, before me, the undersigned, a notary public in and for the County of Erie, came Charles A. Sweet and James [fol. 42] S. Milner, both of them known to me personally, and the said Sweet known to me to be the Second Vice President, and the said Milner known to me to be the Secretary of the Niagara Falls Power Company, the corporation described in and which executed the foregoing lease as party of the first part thereto, and on behalf of said corporation they acknowledged to me the execution of said lease.

And the said James S. Milner, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y., that he is the Secretary of the Niagara Falls Power Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was affixed thereto by the authority of the Board of Directors of said Company and that he signed his name thereto by like authority as Secretary of said Company; that he knows the said Charles A. Sweet, and knows him to be Second Vice President of said Company; that the

signature of said Charles A. Sweet subscribed to the foregoing instrument is in the genuine handwriting of said Charles A. Sweet, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said deponent.

In witness whereof, I have hereunto set my hand and official seal the day and year first above written.

H. Schanzlin, Notary Public, Erie Co., N. Y. (Seal)

36 State of New York,
Erie County Clerk's Office, ss:

I, Frank B. Steele, Clerk of said County and of the Courts thereof, the same being Courts of Record do hereby certify [fol. 43] that H. Schanzlin whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was, at the time of taking such proof or acknowledgment, a Notary Public, in and for the said County, duly commissioned, sworn and authorized to take the same; and further that I am well acquainted with his handwriting, and verily believe that the signature to the said proof or acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Buffalo, this 9 day of April A. D. 1896.

Frank B. Steele, Dp. Clerk. (Seal.)

Ack. of Notary.

State of New York,
County of New York, ss:

Be it remembered that on this first day of April, 1896, before me, the undersigned, a notary public in and for the County of New York, came John L. Norton and John C. Morgan, both of them known to me personally, and the

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said Norton known to me to be the President and the said Morgan known to me to be the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing lease as party of the second part hereto, and on behalf of said corporation, they acknowledged to me the execution of said lease.

And said John C. Morgan, being by me duly sworn, did depose and say that he resides in the City of Niagara Falls, Niagara County, N. Y.; that he is Secretary of the Niagara Falls Paper Company, that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was [fol. 44] affixed thereto by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Secretary of said Company; that
37 he knows the said John L. Norton, and knows him to be President of said Company; that the signature of said John L. Norton subscribed to the foregoing instrument is in the genuine handwriting of said John L. Norton, and was thereto subscribed by the like order of said Board of Directors, and in the presence of said Deponent.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first above written.

Wm. H. Bruder, Notary Public (201), N. Y. County.
(Seal.)

Form 1

State of New York,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a No-

tary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

[fol. 45] In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2 day of Apl. 1896.

Henry D. Purroy, Clerk. (Seal.)

EXHIBIT D TO AMENDED PETITION

This indenture, made this 31st day of January in the year 1898, between the Niagara Falls Paper Company, a corporation organized and existing under the laws of the State of Illinois, and authorized to do business in the State of New York, hereinafter called the "Grantor," party of the first part, and International Paper Company, a corporation duly organized and existing under the laws
38 of the State of New York, hereinafter called the "Grantee," party of the second part.

Witnesseth:

Whereas, the Grantor has acquired certain lands, water and water power at Niagara Falls in the State of New York, by a certain indenture from the Niagara Falls Power Company dated March 7, 1896, and recorded April 9, 1896, in the office of the County Clerk of Niagara County in said State, in Liber 242, page 232; and

Whereas, the Grantor has agreed to sell, convey and assign the said lands, and the said water and water power, and to assign the lease thereof to the Grantee.

Now, therefore, the said Niagara Falls Paper Company, in consideration of the sum of one dollar and other good [fol. 46] and valuable consideration to it in hand paid by the Grantor, the receipt whereof is hereby acknowledged,

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has bargained and sold, and does hereby grant and convey unto the Grantee, its successors and assigns forever, all that certain lot, piece or parcel of land and land under water in the City of Niagara Falls, County of Niagara and State of New York, being a part of lot number seven, Steadman Farm (so-called), more particularly described as follows:

Beginning at a point in the southerly line of Buffalo Street, where said line is intersected by the west line of Lot number eleven (11) Steadman Farm (so-called), running thence south eighty-eight (88) degrees and forty (40) minutes east magnetic, along said southerly line of Buffalo Street seven hundred and ninety-three and three tenths (793.3) feet to a stone monument set in said southerly line; thence south four (4) degrees and sixteen (16) minutes west magnetic six hundred and eighty-seven (687) feet; and into the Niagara River, passing through a stone monument on the present shore line of the Niagara River; thence by curve to the Southwest with radius of one hundred (100) feet one hundred and ninety-five and five-tenths (195.5) feet; thence North sixty-three (63) degrees and forty-three (43) minutes West magnetic seven hundred and two and three-tenths (702.3) feet; and thence North three (3) degrees and fifty (50) minutes east magnetic four hundred and seventy-six (476) feet to the point or place of beginning; containing eleven and seventy-five one-hun-
39 dredths (11.75) acres of land and land under water, more or less; together with three thousand horse power, such as are described in said Indenture, to be used as prescribed in the conditions and covenants therein set forth, with all the privileges and appurtenances to the same belonging; a plan of said premises [fol. 47] showing the point of water intake, wheel-pit, discharge tunnel and other appurtenances, being annexed to said Indenture.

Together with the tenements, hereditaments and appurtenances, and all the estate, right, title and interest of the Grantor in and to said premises and every part thereof,

and also all leaseholds, leases, rights under leases, or under contracts, covenants and agreements, terms or parts of terms owned by the Grantor, or to which it now is or shall at any time hereafter become entitled; all machinery, tools, implements, materials, furniture and rights and privileges of every kind and description however derived and wherever situated; all lands whether under water or not; all water powers and leases thereof and all interests therein; all improvements upon rivers, canals, ponds, and lakes owned by the Grantor, and all rights to float logs thereon, and any and all other rights, privileges and interests therein; all rights of flowage, shorage, boomage, and all rivers, lakes, canals, shores, sluice and other rights; all mill rights and privileges, water-ways and others ways, and all real estate and interest therein wherever such real estate may be situated, and all mixed and personal property of whatever nature or description appurtenant to or connected with or in use upon the property hereby conveyed now owned by the Grantor or in which it has any interest, all papers, maps, inventories and documents in any wise referring or relating to the property hereby conveyed, so far as the same are muniments of title, excepting, however, from the property hereby granted and assigned all cash on hand, book accounts, amounts due to Grantor, manufactured paper on hand, and stocks, bonds and other securities held by it or in which it has any interest.

[fol. 48] Excepting and reserving therefrom that part of the right of way of the Niagara Junction Railway Company, which extends entirely through and across the above described premises, being a strip of land thirty-two (32) feet in width immediately adjacent to the south line of Buffalo Street, and being part of the premises conveyed to the Niagara Junction Railway Company by the Niagara Falls Power Company by deed dated June 11, 1892, and recorded in the Niagara County Clerk's office June 29th, 1892, in Liber 265, at page 498; said right of way being also shown on a map thereof, filed in the Niagara County Clerk's office, June 11th, 1892.

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And also excepting and reserving therefrom a certain branch tunnel from the Paper Mills heretofore constructed by the Grantor to connect with the main tunnel of the Niagara Falls Power Company, in which branch tunnel, however, the Grantee, its successors and assigns, shall have the sole right of exclusive use for its and their own purposes, so long as it and they continue to pay the rental hereinafter specified for the right to take, use and develop water and water power to the extent of three thousand (3,000) horse power, and all other conduits, sluice-ways, wheel-pits and tunnels of the Niagara Falls Power Company.

Being the same premises conveyed and demised to the Grantor by the Niagara Falls Power Company by the Indenture hereinafter mentioned, subject, however, to all the covenants, conditions and reservations therein contained, and reference is hereby made to said Indenture for a particular statement thereof.

To have and to hold the above granted premises to the said party of the second part, its successors and assigns, forever, but nevertheless subject to the reservations and [fol. 49] to the agreements, terms and conditions and all other matters and things in said Indenture set forth as obligatory upon the party of the second part thereto, and among other things, to the payment to the Niagara Falls Power Company, its successors and assigns, of the annual rental provided for by said Indenture which may accrue or become due from and after the date of the transfer of the property hereby conveyed.

The Grantor, for itself, its successors and assigns, covenants with the Grantee, its successors and assigns, that the Grantor is lawfully seized in fee of the above granted land; that it has good right to convey the same as aforesaid; that the same excepting as in said Indenture mentioned are free of all incumbrances; that the Grantor will execute or procure any further necessary assurance of the title
41 to said premises, and that it will warrant and defend the same and the estate therein as hereby conveyed

against the lawful claims and demands of all persons, and that said power by the said Indenture agreed to be taken and paid for shall be maintained as therein provided, and that the grantee, on paying the yearly rental for such power, and performing the covenants and conditions therein contained, shall and may quietly and peaceably have, hold and enjoy the said premises forever.

And for the consideration aforesaid, and also in consideration of the assumption by the grantee of the obligation to pay the rent by said Indenture reserved which may accrue from and after the date of the transfer to the grantee of the property hereby conveyed, and of the obligation to fulfill the covenants of said lease from and after said date, the grantor does hereby further grant, convey, assign, transfer and set over unto the grantee the said indenture hereinbefore mentioned, together with all and singular the [fol. 50] premises, property, easements, rights and privileges therein mentioned and described, and all the buildings and improvements thereon with the appurtenances, and all rights, title and interest of the grantor therein or thereto, and in and to any and all property, easements, rights and privileges granted and conveyed by said Indenture.

To have and to hold all the said lands, water and water power and said Indenture, unto the said grantee, its successors and assigns forever, subject, however, as to the said water and water power conveyed thereby, to the conditions and terms and to the covenants, agreements and limitations in said indenture contained, and the grantor does hereby covenant, promise and agree to and with the said grantee, that the said assigned premises, and the rights therein hereby conveyed and assigned, now are free and clear of and from, all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever, except as hereinbefore mentioned.

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In witness whereof, the Niagara Falls Paper Company in pursuance of resolutions duly adopted by its Board of Directors and also by its stockholders, has caused this indenture to be executed by its President in its name,
42 and its corporate seal to be hereto affixed and attested by its Secretary, this 31st day of January, 1898.

Niagara Falls Paper Co., by J. L. Norton, Pres.
Attest: J. C. Morgan, Sec'y. (Seal.)

[fol. 51] State of New York,
City and County of New York, ss:

On the first day of February in the year 1898, before me personally appeared John C. Morgan, to me known, and being by me duly sworn did depose and say that he resided at Niagara Falls in the State of New York; that he was the Secretary of the Niagara Falls Paper Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors and of the stockholders of said corporation, and that he signed his name thereto by the like order.

Wm. H. Bruder, Notary Public, New York County. (Seal.)

State of New York,
County of New York, ss:

I, William Sohmer, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify, That Wm. H. Bruder whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the

same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

[fol. 52] In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 5 day of Feby. 1898.

Wm. Sohmer, Clerk. (Seal.)

43 EXHIBIT E TO AMENDED PETITION.

This agreement made this first day of June, 1898, between Niagara Falls Power Company, hereinafter called "Niagara Company," a corporation organized and existing under the laws of the State of New York, party of the first part, and International Paper Company, hereinafter called "Paper Company," a corporation organized and existing under the laws of the State of New York, party of the second part.

Witnesseth, That

Whereas, the Niagara Company, by deed dated March 7, 1896, conveyed to the Niagara Falls Paper Company certain premises in the City of Niagara Falls, together with the perpetual right to take, develop and use upon the premises therein granted, water and water power sufficient to produce three thousand horsepower, of the character and under the terms and conditions in said deed particularly mentioned, to which reference is hereby made:

Whereas, by an agreement dated the same day the Niagara Company also agreed to permit the said Niagara Falls Paper Company, its successors and assigns, to take and discharge through the Niagara Company's main tunnel water from the main canal of the Niagara Company, [fol. 53] or from the Niagara River, sufficient to develop and to use upon premises conveyed to the Paper Company twenty-nine hundred horse-power in addition to the three thousand horse-power hereinbefore mentioned, of the character and upon the terms and conditions in said agreement

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particularly mentioned, to which reference is hereby made, and also the further right, upon ten days' written notice to the Niagara Company, to take, use and discharge more water, sufficient to develop blocks of five hundred horse-power up to the full amount of the capacity of the present discharge tunnel leading from the bottom of the Niagara Falls Paper Company's wheel-pit to the main tunnel of the Niagara Company, upon the terms in said agreement particularly mentioned; and

Whereas, the said agreement for such additional twenty-nine hundred horse-power, and such further amounts in blocks of five hundred horse-power as the Niagara Falls Paper Company should elect to take, provided for
44 the use of such additional power for a period of ten years from October 1, 1896, with the right to the Niagara Falls Paper Company and its assigns, at their option, to one or more additional term or terms of ten years each, extending not later than January 1, 1936, upon the same terms, such option to be exercised and notification of such exercise given the Niagara Company at some time during the ninth year of the next preceding term; and

Whereas, the said extensions were limited by said agreement to January 1, 1936, for the reason that the present term of existence of the Niagara Company expires March 31st, 1936, and the Niagara Company is willing to continue the said extensions beyond the date so long as it shall continue in existence; and

[fol. 54] Whereas, the Niagara Falls Paper Company subsequently gave notice to the Niagara Company of its election to take thirteen hundred additional horse-power under the said option in addition to the twenty-nine hundred provided for by said agreement; and

Whereas, the Paper Company has purchased the real estate, property and rights of the Niagara Falls Paper Company, including the real estate conveyed to it by the said deed from the Niagara Company, and all its rights thereunder and under the said agreement hereinbfore

mentioned, and took and received a conveyance and assignment thereof from the Niagara Falls Paper Company dated January 31st, 1898; and

Whereas, the said purchase, conveyance and assignment were made and received by the Paper Company upon the agreement on the part of the Niagara Company to consent to the said conveyance and assignment by the Niagara Falls Paper Company, and to confirm to the Paper Company the grants and rights included in the said deed and agreement hereinbefore mentioned and so assigned to the Paper Company;

Now, therefore, in consideration of the premises and of the assumption by the Paper Company of the obligations in said deed and agreement, and of the agreement on the part of the Paper Company to pay the rent and fulfill the terms and conditions therein reserved and contained, and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto do hereby covenant and agree to and with each other as follows, that is to say:

First. The Niagara Company hereby consents to the transfer and assignment to the Paper Company of the said deed [fol. 55] and agreement, both dated March 7, 1896, between the Niagara Company and the Niagara Falls Paper Company, and of all right, title and interest of the Niagara Falls Paper Company therein, thereto and thereunder, and does hereby confirm the grants, rights and agreements so transferred and assigned to the Paper Company, and agrees with the Paper Company to faithfully fulfill and carry out the said agreement with the same force and effect as if said deed and agreement originally had been made with the Paper Company instead of with the Niagara Falls Paper Company.

Second. The Niagara Company hereby further covenants and agrees that the Paper Company shall have the right at its option after January 1, 1936, to one or more additional term or terms of ten years each, so long as the cor-

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porate existence of the Niagara Company shall be renewed and continued, to take and discharge through the Niagara Company's main tunnel from the main canal of the Niagara Company or from the Niagara River (the Niagara Company hereby agreeing to maintain its said canal and main tunnel so as to enable the Paper Company to take and discharge water), sufficient to develop and to use upon the said premises the said forty-two hundred horse-power, in addition to the three thousand horse-power described in the above mentioned conveyance, and upon ten days' written notice to the Niagara Company such further amounts of water as shall be sufficient to develop blocks of not less than five hundred horse-power up to the full amount of the capacity of the present discharge tunnel, leading from the bottom of the Paper Company's wheel-pit to the main tunnel of the Niagara Company, such additional water to be taken under said options, at the rents and upon the terms and conditions particularly mentioned in the said agreement of March 7, [fol. 56] 1896; provided, however, that such optional right of the Paper Company to further terms beyond January 1, 1936, shall be exercised, and notification of exercise of such right given to the Niagara Company at some time during the ninth year of the next preceding term.

46 Third. The Paper Company hereby assumes the obligations contained in the said deed and in said agreement dated March 7, 1896, and covenants and agrees with the Niagara Company to faithfully fulfill and carry out the same.

In witness whereof, the party of the first part has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary, and the party of the second part has caused these presents to be signed by its First Vice Presi-

dent and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

The Niagara Falls Power Company, by Charles A. Sweet, Vice-President. Attest: L. A. Groat, Secretary. (Seal of the Niagara Falls Power Company.) International Paper Co. Hugh J. Chrisholm, 1st Vice-President. Attest: Warner Miller, Secretary. (Seal of International Paper Company.)

[fol. 57] GENERAL TRAVERSE.—FILED SEPT. 17, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

ARGUMENT AND SUBMISSION

On January 14 and 15, 1929, this case was argued and submitted on merits by Mr. Montgomery B. Angell, for plaintiff, and by Mr. Dan M. Jackson, for defendant.

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* * * * * * * * * *

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(Marginal folio references are to the pages of Volume 68, Court of Claims Reports. Folio references in brackets appearing in the text (e.g., "[fol. 58]") refer to pagination of the record in the Court of Claims, as certified to the Supreme Court of the United States.)

[fol. 58] This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

SPECIAL FINDINGS OF FACT

I

416 The plaintiff, International Paper Company (hereinafter referred to as paper company), is a corporation created and organized on January 31, 1898, under the laws of the State of New York, with its principal office and place of business at Corinth, Saratoga County, New York, and having a general office located in the city of New York, New York. Since its organization it has been engaged in the business of manufacturing, purchasing, selling, and dealing generally in paper and any and all products and

compounds thereof, and materials used in connection with such manufacture, including the manufacture of wood pulp and other fibers. At all times material to this cause of action, the paper company owned and operated some fifteen paper mills located at different points in New York and New England, including a paper mill at Niagara Falls, New York, hereinafter sometimes referred to as "Niagara Falls Mill." The plant of the Niagara Falls Mill was located on the American side of the Niagara River between a mile and a mile and three-quarters above the Falls of Niagara, within the city limits of the city of Niagara Falls, Niagara County, New York.

II.

During December, 1917, and for many years prior thereto, the Niagara Falls Mill of the paper company was engaged in producing wood pulp and other constituent pulps and the manufacture therefrom of newsprint paper for sale to various newspapers and users of newsprint paper throughout the United States. The power used in its manufacturing operations was derived from six water wheels or water turbines, located in a wheel pit on its property some 175 [fol. 59] feet below the surface. The paper company obtained the water necessary for the operation of these six wheels from the main power canal of the Niagara Falls Power Company (hereinafter sometimes referred to as the power company), which was located adjacent to and directly above the Niagara Falls Mill on the banks of the Niagara River. The main intake canal of the
417 power company took its supply of water from the Niagara River. A small side canal leading into the Niagara Falls Mill tapped the main power canal of the power company some 300 feet from the point of intake of the main power canal from the Niagara River. The water taken by the paper company through this side canal was carried through a surface canal to its flumes, thence down the penstock and so to the water wheels in the wheel pit.

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After the water had served its purpose in turning the water wheels, it was discharged into a tailrace tunnel, which joined the main tailrace tunnel of the power company and was ultimately discharged into the Niagara River gorge below the Falls of Niagara. The sketch, attached to the amended petition herein as Exhibit A, shows the geographical relationship of the International Paper Company's Niagara Falls Mill and the Niagara Falls Power Company's plant.

III.

The Niagara Falls Power Company is a corporation organized under the laws of the State of New York with its principal place of business at Niagara Falls, New York. It was formed by a consolidation, effective October 31, 1918, of the Niagara Falls Power Company (constituent), Hydraulic Power Company of Niagara Falls, and the Cliff Electrical Distributing Company, pursuant to chapter 596 of the laws of New York of 1918, and in accordance with a certain joint agreement of consolidation dated September 20, 1918. The Niagara Falls Power Company (constituent) was organized in 1886 under a special act of the Legislature of the State of New York, chapter 83 of the Laws of 1886, under the name of the Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls. It was organized for the purpose, among other things, of furnishing hydraulic power for manufacturing purposes in the town of Niagara Falls and in the county of Niagara. Among its specified powers, as granted by the Legislature of the State of New York, were the following:

"(a) To convey lands;

"(b) To sell, lease, and supply the waters taken from the Niagara River between certain specified points or the power to be developed therefrom for manufacturing, electrical, or power purposes." (Chap. 109, § 2, Laws of N. Y., 1889.)

418 Its name was changed to the Niagara Falls Power Company by order of the Supreme Court of the State of New York, dated November 11, 1889.

IV.

The power company (constituent) acquired lands bordering upon the shores of the Niagara River just above the Falls of Niagara, constructed a plant thereon, and took and used water from the Niagara River to furnish hydraulic power for manufacturing purposes and to manufacture [fol. 60] electrical power. The claim of right of the original power company and its successor, the present power company, to take, use, sell, lease, and supply water from the Niagara River was and is derived from the following sources:

"(a) Private grants in fee of lands bordering on the Niagara River extending upwards of some two miles in length above and below the point of intake of the power company's canal, and including the point of intake.

"(b) Letters Patent from the State of New York dated December 31, 1891, and March 3, 1892, and recorded respectively in Book of Patents No. 44, page 487, and Book of Patents No. 48, pages 401-403, granting to the power company as the owner of the uplands, certain lands under water and between high and low water mark in the bed of the Niagara River in front of and adjacent to the uplands owned by the power company;

"(c) Special acts of the Legislature of the State of New York specifically granting to the power company the right to take, use, store, sell, and lease water from the Niagara River, viz: Chapter 83 of the Laws of 1886; chapter 109 of the Laws of 1889; chapter 253 of the Laws of 1891; chapter 513 of the Laws of 1892; chapter 477 of the Laws of 1893."

During the year 1917 and for many years prior thereto the power company owned and operated two hydroelectric plants, one on either side of its intake canal. In these plants it generated electrical energy by power obtained from the waters diverted by it from the Niagara River through its main power canal. The water so used by it and the water

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taken by the paper company through the side intake canal was part of the water which the power company diverted from the Niagara River.

V.

419 On March 19, 1906, the American members of the International Waterways Commission, a commission created in 1902 (32 Stat. 373), rendered a report in which it was recommended that the amount of water thereafter to be diverted from the Niagara River above the Falls of Niagara on the American side should be limited to 18,500 cubic feet per second (c. f. p. s.), and that permits should be granted to users located on the American side as follows:

Niagara Falls Power Company	8,600 c.f.p.s.
Niagara Falls Hydraulic Power & Manufacturing Company (the predecessor of the Hydraulic Power Company of Niagara Falls)	9,500 c.f.p.s.
Erie Canal and its tenants	400 c.f.p.s.
Total	18,500 c.f.p.s.

The Burton law (34 Stat. 626) authorized the Secretary of War to grant permits for the diversion of 15,600 c.f.p.s. of water from the Niagara River. Pursuant to this statute, the Secretary of War issued the following permits for a limited period of time:

Niagara Falls Power Company	8,600 c.f.p.s.
Niagara Falls Hydraulic Power & Manufacturing Company	6,500 c.f.p.s.
Erie Canal and its tenants	500 c.f.p.s.
Total	15,600 c.f.p.s.

VI.

In May, 1910, a treaty between the United States and Great Britain, governing the taking of water from the Niagara River, was promulgated (36 Stat. 2448). This treaty

provided that the United States might authorize the diversion from the Niagara River above the Falls in the State of New York for power purposes of an amount of water not exceeding in the aggregate a daily diversion at the rate of 20,000 c. f. p. s., and the Dominion of Canada might authorize a like diversion of water from the Niagara River in the Province of Ontario for power purposes not exceeding in the aggregate a daily diversion at the rate of 36,000 c. f. p. s. This treaty remained in force unmodified, at all times material to this action.

VII.

At all times between August 16, 1907, and March 4, 1913, the power company was authorized by the Secretary
420 of War, acting pursuant to statutes or resolutions of Congress, to divert water in the amount of 8,600 c. f. p. s. from the Niagara River above the Falls of Niagara. The United States did not undertake to issue any licenses covering the diversion of water from the Niagara River above the Falls between March 4, 1913, and January 19, 1917. During this period the power company continued to take from the Niagara River the amount of water it had theretofore been taking and no objection to such diversion was ever made by the United States.

On January 19, 1917, the Secretary of War issued to the power company the following license:

"Permit for Additional Diversion of Water from the Niagara River

"Subject to the provisions of the joint resolution of Congress, approved January 19, 1917,[1] 'authorizing the Secretary of War to issue temporary permits for additional diversion of water from the Niagara River,' permission, revocable at will is hereby given the Niagara Falls Power Company, of Niagara Falls, New York, to divert water for power purposes additional to the eight thousand six

[1] 39 Stat. 867.

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hundred (8,600) cubic feet per second, the amount of water being diverted by said company on the date of the approval of said resolution, such additional amount not to exceed a daily diversion at the rate of one thousand four hundred (1,400) cubic feet per second. This permit, unless sooner revoked, shall expire in any event with the thirtieth day of June, nineteen hundred and seventeen, and is subject to further conditions as follows: * * *"

Under date of July 2, 1917, the following letter was directed to the power company:

The Niagara Falls Power Co., Niagara Falls, N. Y.

GENTLEMEN: The following notation has been added to the department's copy of the permit of January 19th, 1917, to the Niagara Falls Power Company for additional diversion of water from the Niagara River:

[fol. 62] "War Department, June 30, 1917. In accordance with the provisions of S. J. Res. 13, 65th Congress,[2]
421 approved this date, the foregoing permit is hereby continued in force until July first, 1918, subject to all of the conditions and restrictions therein contained, prompt report of all additional power furnished under this extension to be made in the manner specified in condition one.

"Newton D. Baker, *Secretary of War.*

"By direction of the Chief of Engineers:

"Very respectfully, C. Keller, *Lt. Col., Corps of Engineers.*"

On July 1, 1918, the Secretary of War issued the following permit to the power company:

"Permit for the Diversion of Water from Niagara River for Power Purposes

"Subject to the provisions of the joint resolution of Congress, approved June 29, 1918,[3] authorizing the Secretary of War to issue permits for the diversion of water from

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2 40 Stat. 241.

3 40 Stat. 633.

the Niagara River, permission, revocable at will by the Secretary of War, is hereby given the Niagara Falls Power Company, a corporation organized under the laws of the State of New York and now actually producing power from the waters of said river, to divert water in the United States from the said river above the Falls for the creation of power, provided that the quantity diverted by the said company shall in no event exceed in the aggregate a daily diversion at the rate of ten thousand cubic feet per second, and that this permission shall be subject to further conditions, as follows: * * *"

This permit of July 1, 1918, continued in effect until July 30, 1919, when the Secretary of War issued another permit to the power company (consolidated) covering the diversion of 19,500 cubic feet of water per second from the Niagara River.

At no time were these licenses or any of them ever modified or revoked.

The act of June 29, 1906, 34 Stat. 626, commonly known as the Burton Act, in section 5 provides that the provisions of the act should remain in force for three years from the date of passage unless sooner revoked by the Secre-
422 tary of War. The act was extended by joint resolutions of the Senate of March 3, 1909, 35 Stat. 1169, for two years, and by joint resolution, 37 Stat. 43, approved August 22, 1911, extending the time until March 1, 1912, and by joint resolution, 37 Stat. 631, approved April 5, 1912, extending time to cover the period from March 1, 1912, to the 4th day of March, 1913.

VIII.

On the 7th day of March, 1896, the power company executed a deed, which is duly recorded, conveying a tract of land to the paper company, copy of which deed is attached [fol. 63] to plaintiff's amended petition as Exhibit B, and is made a part hereof by reference.

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On said date the power company executed a lease, which is duly recorded, and copy of which is set out as plaintiff's Exhibit C and made a part hereof by reference.

On January 1, 1898, the plaintiff procured from Niagara Falls Paper Company a deed, copy of which is attached to plaintiff's amended petition as Exhibit D, and is made a part hereof by reference.

On June 1, 1898, plaintiff procured from the Niagara Falls Power Company an agreement attached to plaintiff's amended petition as Exhibit "E" and made a part hereof by reference.

The paper company from time to time duly exercised the option contained in the lease of March 7, 1896, and took and used additional blocks of water in accordance therewith. In January, 1918, the paper company at its Niagara Falls mill was taking and using from the main power canal of the power company an amount of water sufficient to develop 8,156.25 horsepower. This was equivalent to approximately 720 c. f. p. s. of water. During the several years preceding 1918, the paper company had paid to the power company for the right to take and use this amount of water an annual rental of $7[illegible],562.50.

The tract of land upon which the Niagara Falls Mill was located was separated both from the Niagara River and the main power canal of the power company by a strip of land reserved by the power company at the time of the grant of the Niagara Falls Mill tract in 1896. The paper company's property did not touch the Niagara River at
423 any point, and there was no source from which the paper company could obtain water for the purpose of running the Niagara Falls Mill other than the power canal of the power company.

At the time of the shutdown in February, 1918, hereinafter described in detail, the machinery with which the Niagara Falls Mill was equipped for developing its needed power could be driven only by water power applied directly. The use of steam in place of water as the source of

power would have been impractical because of the prohibitive cost. On account of existing war conditions and because the manufacture of newsprint paper was considered by the Council of National Defense as a nonessential industry, it was impossible to obtain either electric-power machinery in replacement of the water-driven machinery or the electric power with which to run such machinery. At this time the usefulness of the Niagara Falls Mill as a going concern was dependent wholly upon its ability to obtain water from the power canal of the power company.

IX.

During the latter part of 1917 it was brought to the attention of the Secretary of War that there was a disposition on the part of the Canadian Power Administrators to forbid the exportation to the United States of power developed on the Canadian side of the Niagara River at Niagara Falls. The Secretary of War was advised that if this should be done it would seriously interfere with many industries located in and around Niagara Falls which were essential to the war activities of the United States. One of the reasons for this attitude of the Canadian authorities was [fol. 64] the feeling on their part that a portion of the power generated at Niagara Falls was being used for industries which were not essential for the prosecution of the war. At or about this time the Secretary of War appointed Robert J. Bulkley to act as his representative in the administration of power at Niagara Falls. He directed Mr. Bulkley to investigate the situation which was threatening there and to negotiate, inquire into, and work out the details of policies, the actual execution of which should and finally did rest with the Secretary of War.

424 Following numerous conferences, in which it was agreed that the manufacture of newsprint paper was a nonessential industry and should give way to the manufacture of war materials, the Secretary of War through his representatives assured the Canadian Government that he

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would cooperate in conserving power manufactured at Niagara Falls and devote it to war uses if the Canadian Government would agree to continue to permit power to be exported from Canada to the United States at Niagara Falls. The ultimate objective of the Secretary of War was to make the maximum use of all power available at Niagara Falls, whether developed on the American side or imported from Canada for essential war uses to the extent that power was needed for them, and to give priority in respect of power to the essential industries.

X.

On December 10, 1917, Robert J. Bulkley, acting in his capacity as legal adviser of the War Industries Board and the Council of National Defense and as the personal representative of the Secretary of War, wrote to F. L. Lovelace, secretary of the power company, as follows:

Council of National Defense, Washington

December 10, 1917.

F. L. Lovelace, Esq., Niagara Falls Power Co.,
Niagara Falls, N. Y.

DEAR MR. LOVELACE: We have been somewhat delayed in getting out our orders in the Niagara Falls power situation, as some reports that we have called for are just coming in now.

* * * * * * * * * *

Kindly advise us immediately of the rights of the International Paper Company to take water from your company's canal. I would appreciate your sending us copies of any contracts or agreements existing between your company and the International Paper Company on this subject.

Very truly yours, ROBERT J. BUCKLEY.

On December 13, 1917, F. L. Lovelace, secretary of the Niagara Falls Power Company, in response to the letter above set out, wrote Mr. Bulkley as follows:

425 The Niagara Falls Power Company

December 13, 1917.

Hon. Robert J. Bulkley, Council of National Defense, Washington, D. C.

DEAR MR. BULKLEY: Your letter of the 10th inst. is received and its contents have been noted with interest.

[fol. 65] International Paper Company

By warranty deed dated March 6, 1896, this company conveyed to Niagara Falls Paper Company 11.75 acres of land (about opposite the entrance of our intake canal) "together with three thousand horsepower." By a separate indenture under the same date this company agreed to permit the paper company to take and discharge as specified in the agreement additional amounts of water for the production of power "up to the full amount of the capacity of the present discharge tunnel" of the paper company.

The paper company definitely called for an aggregate of 7,200 h. p. Measurement made in the manner provided in the agreement, however, indicated the capacity of the paper company's tunnel and that company's actual use to be 956.25 h. p. in excess of the 7,200 h. p. definitely called for.

The measurements were accepted and for several years past invoices and payments have been based thereon. The paper company pays for 3,000 h. p. provided under the terms of the deed at the rate of $8 per h. p. per year, and for the remaining 5,156.25 h. p. it pays at the rate of $10 per h. p. as provided in the agreement.

With the consent of this company and, I understand, by written grants the International Paper Company has duly succeeded to all the estate and rights of Niagara Falls Paper Company.

The current terms of renewals of the rights under the agreement will expire October 1, 1926, and, pursuant to the terms of the agreement, the paper company has the

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further option to renew for additional terms extending not later than January 1, 1936. Corporate.

I am sending you under separate cover, together with a carbon copy hereof, copies of the following instruments:

(1) Deed executed by the Niagara Falls Power Company to Niagara Falls Paper Company, dated March 7, 1896, and recorded in Niagara County clerk's office April 9, 1896, in book 242 of deeds at page 232.

426 (2) "Lease of additional power," being an agreement executed by and between the Niagara Falls Power Company and Niagara Falls Paper Company, dated March 7, 1896.

(3) Agreement by and between the Niagara Falls Power Company and International Paper Company, dated June 1, 1898.

(4) "Renewal of term of agreement of March 7, 1896," executed by the Niagara Falls Power Company and International Paper Company, dated September 27, 1905.

(5) Notice signed by International Paper Company, dated December 2, 1915.

Very truly yours, F. L. LOVELACE, Secretary.

XI.

Subsequent to determination by the Council of National Defense that the manufacture of newsprint paper was a nonessential industry, and in view of the facts and circumstances surrounding the conditions at Niagara Falls and on December 28, 1917, the following, hereinafter referred to, respectively, as order, schedule, and temporary [fol. 66] waiver, duly signed by the Secretary of War and the president of Niagara Falls Power Company, were mutually exchanged:

Council of National Defense, Washington,

December 28, 1917.

To Niagara Falls Power Company, Niagara Falls, N. Y.

SIRS: The President of the United States by virtue of and pursuant to the authority vested in him, and by reason

of the exigencies of the national security and defense, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith.

You are directed to make immediate and continuous delivery of such power until further notice. This order will be given precedence over any and all orders and contracts heretofore placed with you.

You will be paid fair and just compensation for power delivered hereunder.

Kindly acknowledge receipt hereof to the undersigned.

NEWTON D. BAKER, Secretary of War.

427 RJB—F.

Temporary Waiver of Delivery of Electrical Power of Niagara Falls Power Company

Whereas the President of the United States, by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the natural security and defense has placed an order with Niagara Falls Power Company on the 28th day of December, 1917, and on the same date has requisitioned from it the total quantity and output of electrical power which is capable of being produced and/or delivered by said company through the use of all waters diverted or capable of being diverted through the intake canal of said Niagara Falls Power Company and/or the plants or machinery of said company connected therewith; and

Whereas said Niagara Falls Power Company has requested that it be permitted to carry on its business of production, importation, sale, and distribution of such power as is or may be developed, generated, or imported by it in whatever manner and to whatever extent may be deemed to be consistent with the exigencies of the national security and defense; and

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Whereas in the judgment of the Secretary of War such exigencies will be provided for adequately for the time being if the electrical power hereby ordered and requisitioned from said company be sold by and for the account of said Niagara Falls Power Company and distributed by it in the manner shown in the attached schedule; and

Whereas said company has offered to waive all claim for compensation from the United States by reason of said order and requisition and/or the delivery of power under the conditions set forth in the schedule hereto attached, save as to such power as actually may be delivered to the United States:

[fol. 67] Now therefore the Secretary of War, acting for and in behalf of the United States, hereby until further notice to said company, waives delivery to the United States of any of the power capable of being produced and/or delivered by said company, on the express condition that said company shall distribute such power as provided in the schedule hereto attached.

Upon request of the Secretary of War, or his duly authorized representative, said Niagara Falls Power Company shall furnish a sworn statement showing the users of said power during any specified period, together with the maximum quantity of power delivered daily and the rate of compensation charged to each user, and such other information as may be requested.

428 Said Niagara Falls Power Company hereby waives any and all right to compensation from the United States by reason of said requisition and order and/or delivery of said power under the conditions hereinbefore imposed.

In witness whereof this instrument has been executed in duplicate on the 28th day of December, 1917, on behalf of the United States by the Secretary of War and the said company has caused the same to be executed and its corporate seal attached by its president hereunto duly authorized.

NEWTON D. BAKER, Secretary of War. Niagara Falls Power Company, by —— ——, President.

Schedule

The Niagara Falls Power Company shall deliver all electrical power, delivery of which is waived by the United States as provided in the waiver attached, under existing contracts, to the persons now entitled to receive such power, except that delivery of electrical power to the following consumers shall be curtailed as herein indicated:

"Hooker Electric Chemical Co. Reduced to 5,100 h. p.
"Niagara River Manufacturing Co. No power between hours of 6 a. m. and 7:30 p. m."

Said Niagara Falls Power Company shall use the additional power made available by increased use of water in its canal or by the curtailments herein prescribed or otherwise, to increase the amount of electrical power deliverable to the users named below—it being the intent hereof that they shall receive respectively and continuously the approximate amounts of electrical power set opposite their respective names.

"Carborundum Company, 13,500 h. p.
"Acheson Graphite Company, 7,000 h. p.
"Niagara Electro Chemical Company, 13,500 h. p."

The foregoing table is based upon the ability of said Niagara Falls Power Company to operate its plants and line at full capacity and efficiency.

Whenever said Niagara Falls Power Company shall have a surplus of electrical power above the requirements of its customers under the provisions of the foregoing waiver and this schedule it shall make distribution thereof to the [fol. 68] customers on its lines in the following order of priority, viz:

"Star Electrode Works.
"Acheson Graphite Co.
"Union Carbide Co.
429 "Oldbury Chemical Co.
"Niagara Electro Chemical Co.

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"Carborundum Company.
"Phosphorus Compound Co.
"Mathieson Alkali Works, Inc.
"Hooker Electro Chemical Co.
"Niagara Alkali Co.
"Norton Company of New York.
"Aluminum Company of America.
"Buffalo General Electric Co."

In case of a deficiency in the supply of electrical power said Niagara Falls Power Company shall withdraw power first from consumers not named above and then from the several named customers in the inverse order of the foregoing list so far as the same may be done without undue damage to the plants and/or products of said several customers. There shall, however, be no curtailment of power deliverable to public utilities, or to small users employing an average of not to exceed 100 h. p. each until after all larger users shall have been curtailed as far as such curtailment may be effected without causing undue "damage."

XII.

On December 29, 1917, Robert J. Bulkley, acting as the representative of the Secretary of War, wrote to Mr. Lovelace concerning the order which had been issued under date of December 28, 1917. This letter contained the following paragraph:

"Please note that the requisition order covers also all of the water capable of being diverted through your intake canal to such extent as it can be used on your machinery. This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity. Representatives of the International Paper Company were advised of this contemplated action some time ago and should by this time be prepared for the cut-off."

On December 31, 1917, Mr. Bulkley, acting as the representative of the Secretary of War, telegraphed F. B. Jennings, general counsel for the paper company, as follows:

"Power company has been directed to take water hitherto used by International Paper Co. * * *."

XIII.

On or about December 12, 1917, the local manager of the Niagara Falls mill of the International Paper Company was notified that the water which it was then taking from the power company's canal was to be shut off as soon as the stock which was then in process of manufacture could be run out.

[fol. 69] At the time the paper company was advised that it was to be deprived of the water which it had theretofore been taking, it had on hand at its Niagara Falls mill large stocks of unfinished paper, wood pulp, etc., which it was necessary to run out if needless waste was to be prevented. Mr. Bulkley, on behalf of the Secretary of War, agreed that the paper company might continue taking sufficient water from the canal of the power company to enable it to "run out" this stock on hand.

This was not accomplished until February 7, 1918. At 12.30 a. m., February 7, 1918, the paper company ceased using water from the power canal of the power company and thereafter did not resume the use of such water until midnight November 30, 1918, when the order of December 28, 1917, was abrogated.

Between February 7, 1918, and November 30, 1918, the order of December 28, 1917, remained in effect unmodified, and the schedule accompanying the same at no time permitted or authorized the power company to deliver any water to the paper company. During this entire period the power company took and used all the water diverted from the Niagara River through its power canal and refused to deliver and did not deliver any water to the paper company.

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XIV.

The paper company has never been paid any compensation by the United States or by any one else on account of the water and the water rights to which it was entitled under the aforesaid deeds and leases and of which it was deprived as aforesaid between February 7, 1918, and November 30, 1918, by the United States.

XV.

During 1917 and 1918, there were no sales or leases of water or water power or water rights at Niagara Falls or its immediate vicinity other than that made by the power company to the paper company as aforesaid.

XVI.

Prior to the shutdown of the Niagara Falls Mill in February, 1918, the daily capacity or normal average output of this mill was 154 tons of newsprint paper per day.

XVII.

In the fall of 1917 and throughout 1918, there was available for use at the Niagara Falls Mill pulp wood and
431 other raw materials necessary for the operation of said mill throughout 1918 in the production of newsprint paper at the rate of 154 tons per day.

XVIII.

In the fall of 1917 and throughout 1918, a sufficient supply of men was available for the operation of the Niagara Falls Mill throughout 1918 on the basis of an output of 154 tons of newsprint paper per day.

[fol. 70] Prior to the shutdown in 1918 the paper mill employed approximately 500 men. After the shutdown only about ten men all told remained in the mill in order to look after the steam-boiler house, fire protection, and one fore-

man kept on the pay roll in order that he might be held. These ten employees acted in the nature of caretakers.

XIX.

Throughout 1918 the demand for newsprint paper of the kind manufactured at the Niagara Falls Mill was greater than the paper company could supply, and the condition of the market for newsprint paper throughout 1918 was such that it would have absorbed the entire output of the Niagara Falls Mill during that period if that mill had been able to operate at its full capacity of 154 tons of newsprint paper per day.

XX.

In the fall of 1917 and throughout 1918 prices for newsprint paper were rising. The sales prices of newsprint paper in carload lots during 1918 were as follows:

"January 1, through March 30, 1918—$60 per ton, f. o. b. mill.

"April, 1918—$70 per ton, f. o. b. mill.

"May 1, through June 30, 1918—$72.65 per ton, f. o. b. mill.

"July 1 through December 31, 1918—$75.05 per ton, f. o. b. mill."

XXI.

In the fall of 1917 the paper company, in making contracts for the sale and delivery of newsprint paper during 1918, relied upon the expected 1918 output of the Niagara Falls Mill of 154 tons of newsprint paper per day. Because of the shutdown of the Niagara Falls Mill, the paper company requested certain of its contract customers to
432 cut down on their contract commitments.

Some of them complied with this request and the company was able to and did satisfy, from other plants operated by it, the commitments remaining.

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XXII.

Between February 7, 1918, and December 1, 1918, the Niagara Falls Mill of the paper company sustained an actual out-of-pocket or direct overhead expense of $304,685.26 on account of the shutdown. This loss would not have been sustained if the mill had been able to operate during the period of the shutdown. It does not satisfactorily appear what loss of profits, if any, the plaintiff sustained by reason of its plant being closed during a portion of the year 1918.

XXIII.

At all times between November 1, 1917, and January 1, 1919, the demand for power at Niagara Falls far exceeded the available supply. During this period the standard price for electric energy supplied by the Niagara Falls Company [fol. 71] in the city of Niagara Falls, not in renewal of preexisting contracts, was at the rate of $20 per horsepower per annum. Between February 7, 1918, and November 30, 1918, large consumers of electrical power at Niagara Falls purchased and used blocks of power ranging from 1,600 horsepower to 14,000 horsepower and paid for such power at a rate varying between $33 and $47.05 per horsepower per annum. Any additional power which might have been available at Niagara Falls between February 7, 1918, and November 30, 1918, would have commanded a price of not less than $47.05 per horsepower per annum.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him.

OPINION

GRAHAM, Judge, delivered the opinion of the court:

The plaintiff is claiming damages as just compensation for the taking of its property by the defendant for public use. The alleged taking, stating it in a general way, is the action of the defendant in preventing it from getting water to generate its power for its plant from the canal of the Niagara Falls Power Company under leases and claimed rights from the latter company. The defendant defends upon the grounds:

433 (1) (*a*) That there was no taking of the plaintiff's property;

(*b*) That the water and its consequent power, if taken, were not private property, but were under the control of the United States Government;

(*c*) That if it was taken, it was not for a public use, that the United States did not use it, and it was distributed to private industries which were aiding in the prosecution of the war;

(2) That if the plaintiff was damaged the damage was consequential, under the Omnia Commercial Co. case, 261 U. S. 502, and its injury was incidental to the exercise of sovereign power, as the Government, if it requisitioned, requisitioned only the product of the Niagara Falls Power Company;

(3) That the use of the water in the Niagara River for power purposes is controlled by stipulation in a treaty between the United States and Great Britain ratified May 5, 1910, prior to the action herein complained of, and that the plaintiff is barred under section 153 of the Judicial Code;

(4) That whatever was secured by the Government from the Niagara Falls Power Company was secured by reason of a contract with that company wherein it waived all claim for damages by reason of any requisition proceedings and

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consented to deliver its power to private individuals as directed in the agreement, and that if the plaintiff has any right of action it is against the Niagara Falls Power Company by reason of this contract;

[fol. 72] (5) That under this contract, if the Government exercised any right it was merely the right to direct how the power of the Niagara Falls Power Company should be used, and to what individual manufacturers it should be distributed in connection with and to promote the prosecution of the war and the national defense; and

(6) That if there was a taking it was under a claim of right.

The plaintiff owned a plant for the manufacture of paper, located above and near the falls of the Niagara River, which was operated by water power. This power was secured through an intake opening on a small canal
434 constructed above the Falls and owned and operated at the time by another corporation, the Niagara Falls Power Company. The plaintiff's property did not abut on this canal and was separated from it by a street. The water was passed through an intake from the canal to and down a chute extending some distance below its level to machinery which was propelled by the force of its fall, and the water carried out through a small runway into the main runway of the Niagara Falls Power Company, and from there to the river below the Falls. It had secured the right to use the water from the canal by a contract with the Niagara Falls Power Company, which allowed it to take sufficient water to generate a certain number of units of water.

The Niagara Falls Power Company, prior to the execution of said contract had constructed a canal in the nature of a cul de sac on its own land, and connected with the waters of the Niagara River above the Falls, and in such a way that the water ran into this canal up to the level of the river. Near the end of the canal it had constructed a chute which carried the water some distance below the surface, and as in the case of the International Paper Com-

pany it turned machinery which generated power. It had also its own underground runway above mentioned, which carried this water off and into the river below the Falls. Its business was producing power and selling it for manufacturing, lighting, and other purposes. It did not manufacture anything but power. Its product was power.

The Niagara Falls Power Company was using the water which passed into its canal under a license from the United States granted by the Secretary of War by virtue of the authority given him under the act of June 29, 1906; 34 Stat. 626, known as the Burton Act. This license limited said company to the use of water sufficient to produce a certain number of units of power. The license was revocable at the will of the Government and discretion of the Secretary of War.

The Niagara River was in the nature of an international boundary between the United States and Canada, and under a treaty of May, 1910, between the United
435 States and Great Britain, was open to the joint and unrestricted use for navigation and all necessary control of navigation as might be determined by joint action. And under treaty, also, between these countries a limit was placed on the amounts of water that could be taken by each of them from the Niagara River for the production of power; that is, each was allowed to use water up to certain units of power. So that this treaty, as was intended, placed the control of the water of the river for power purposes under the control of the two governments, [fol. 73] and, being a treaty, it is part of the supreme law of the land. We have, then, the Government of the United States, by treaty, obligated to limit on its side the amount of water to be taken from the Niagara River for power purposes and assuming control. But, aside from the treaty, as between the States and its citizens the Government had the right to control the use of power and the building of dams and structures necessary to generate power in the navigable waters of the United States, of which the Niagara

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River was a part. Congress on June 10, 1920, 41 Stat. 1063, passed the Federal Power Commission act, sometimes designated as the water power act, which imposed penalties for its violation and appointed a commission to control and pass upon permits. The right embodied in and exercised by this statute was based upon the authority of Congress to preserve the navigability of waters of the United States, including those open to foreign commerce. The constitutional power of Congress to exercise this right was fully discussed and considered by Congress during and prior to the passage of the act. In view of this conclusion of Congress as to its constitutional right to control water for power, this court will not undertake to say that it has not the power therein asserted and exercised.

We further see that the Niagara Falls Power Company was securing water for its canal under a revocable license under the Burton Act, supra. Had the license been revoked, as it could have been at any time, its ability to produce its power would have ended, and the right to use the water in the canal would have terminated, as would the plaintiff's right as its lessee. The plaintiff had no right to use or connect with the water in said canal of the Niagara
436 Falls Power Company except by contract with that company, and the right which was granted under the contract would give the plaintiff no higher rights than were possessed by the power company. And had the United States revoked the permit of the power company, which would have in effect canceled the contract of the plaintiff with that company, it is plain that the plaintiff could have had no action either against that company of the Government which canceled the license.

The Council of National Defense, under authority of the act of August 29, 1916, chap. 418, 39 Stat. 649, was granted authority to make recommendations to the President and heads of departments, among other things, as to the "utilization of waterways, the increase of domestic production of articles and materials essential to the support of the Armies and of the people during the interruption of for-

eign commerce." Prior to the issue of the so-called commandeering order by the Secretary of War, hereinafter mentioned, the Council of National Defense had held that the production of print paper was not an essential industry to the support of the Army and the conduct of War, and at the time of the issuance of the order much of the power produced by the Niagara Falls Power Company was being used for this purpose, and for the same purpose power secured from Canada was being used, and the Canadian Government had suggested that this latter power was not being used to operate industries which aided in the prosecution of the war.

Thereupon the Secretary of War, by authority of the President, on December 28, 1917, issued an order to the [fol. 74] Niagara Falls Power Company, which stated that the President "hereby requisitions the total quantity and output of the electrical power which is capable of being produced or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal or your plants and machinery connected therewith. You are directed to make immediate and continuous use of such power until further notice." With this order was filed what was called a temporary "waiver" or contract by the Niagara Falls Power Company which was the result of prior negotiations. It recited the requisition just
437 mentioned, and further, "that the Niagara Falls Power Company had requested to be permitted to carry on its business of production, importation, sale, and distribution of such power" as it could develop consistent with the exigencies of national security and defense, and that the Secretary of War felt that such exigencies would be provided for if the power company would distribute all the power which it was capable of producing in the manner indicated in an attached schedule, which schedule gave the names of certain plants to which power was to be distributed and furnished. The plaintiff's name was not among those named and by virtue of this agreement between the Secretary of War and the power company it would be cut

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off and was cut off from taking water for its power plant under its contract with the power company, as the latter was to use all the water that the Government under the license allowed to be taken.

This waiver or, rather, contract, for contract it was, further recited that the Niagara Falls Power Company had offered to waive all claims for compensation from the United States by reason of said order and requisition, and it agreed to deliver the power under the conditions set forth in said schedule. The contract provided that in view of the facts recited the United States Government waived delivery, until further notice, to the United States of any power upon condition that it be distributed to the parties named in the schedule, and the power company waived any and all right to compensation from the United States by reason of said requisition order, or the delivery of power under the conditions named in this contract.

It will be seen that the Niagara Falls Power Company, without the permit from the Government, or in case of the cancellation of the permit, would be operating illegally and the rights of the plaintiff against the United States could not be better or other than those of the Niagara Falls Power Company. Instead of cancelling the permit of the power company by not including the plaintiff in the schedule, the permit which the plaintiff had secured by its contract with that company was frustrated. If the Government had the right to cancel as to the Niagara Falls Power Company, it had the right to cancel as to plaintiff.

438 Whatever the action which it took may be called, it proceeded under a claim of right. Tempel v. United States, 248 U. S. 121; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; and Natron Soda Company case, 257 U. S. 138. It follows also in this connection that if the Government assumed control of, or was obligated to control, the use of water from the Niagara River for power purposes under the aforesaid treaty with Great Britain, it had this right of control under the Constitution and was exercising

it by virtue of the aforesaid Federal Power Commission act (June 10, 1920).

[fol. 75] But, aside from this view of the matter, if the foregoing considerations were not in the case, the plaintiff could not recover, (1) because it was deprived of its contract with the Niagara Falls Power Co. by a contract which the latter company voluntarily entered into with the United States, and if it had any right of action it would be against that company; (2) what the Government took by the requisition order, if it took anything, was the *product* of the Niagara Falls Power Company. It did not take its plant or the use of it. It did not take its canal. It took what power it could produce and was producing from the entire plant; that is, as stated, it took the product of the plant, not the plant.

By reason of the alleged taking, the contract to furnish so much water to the plaintiff was frustrated, not taken. The situation, as far as the principle involved is concerned, is the same as in the Omnia Commercial Co. case, 261 U. S. 502, 511. The damage to the plaintiff was incidental. The Government did not take plaintiff's plant or its contract with the Niagara Falls Power Company, nor did it intend to take it.

In this case the Government, if it took anything, did not take the res, as it was held in the Duckett case, 266 U. S. 149, that it did. There it took over the whole terminal plant, and the plaintiff was the lessee of a portion of it, and it was held that the taking over of the res took his lease, which was a part of the res, but in the case at bar the Government did not take the res, it did not take over the plant or its operation or its use. It simply commandeered the output or product of the plant, that is, such power as the plant under the conduct and management of the company was able to turn out, and this is as close to
439 what was done in the Omnia Commercial case, supra, as we could well have it without having the identical facts. In that case plaintiff had a contract antedating the taking, under which the company was to furnish it so

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many tons of steel at a given price for which it had already paid. The court held that the contract was not taken, but frustrated, and that it was an incidental loss for which there was no recovery, a loss incident to the legitimate exercise of a sovereign right by the Government.

But, further, by the subsequent contract with the Niagara Falls Power Company by which the plaintiff was deprived of its rights, the Government did not even appropriate or receive the product, as in eminent domain, of the Niagara Falls Power Company for public use, but, on the contrary, it was furnished to and received by those corporations named in said schedule, with the consent of said company. It controlled the distribution of the product under a contract with that company, in which contract that company expressly waived all claims for damage, if any there were, by reason of the previous requisition to which this contract was the successor. The Government did not take the property of the Niagara Falls Power Company without its consent, but, on the contrary, with its consent, and if there was no taking as to the Niagara Falls Power Company, it is very plain that there would be none as far as the plaintiff is concerned.

In 1902 an international waterways commission, composed of three representatives of the United States and three representatives of the Dominion of Canada, was created, 32 Stat. 373, which recommended that the amount of [fol. 76] water be taken on the American side from the Niagara River above the Falls should be limited to 18,500 cubic feet per second. Thereafter Congress asserted its constitutional right to control water of navigable streams within the control of the United States. On June 29, 1906, it passed what was known as the Burton Act, 34 Stat. 626, which authorized the Secretary of War to grant permits for the diversion of 15,600 cubic feet per second from the Niagara River. The Niagara Falls Power Company applied for and was granted revocable licenses beginning August 16, 1907, and from time to time they were

440 renewed by joint resolutions of Congress. Under date of January 19, 1917, a license revocable at the will of the Secretary of War was granted, and on July 1, 1918, a further revocable license was granted authorizing the diversion by the Niagara Falls Power Co. and the Hydraulic Power Co., a subsidiary of said company, of practically 97½% of the amount of power allotted to the United States under the said treaty, and thereafter, on July 30, 1919, another revocable permit or license was granted the said Niagara Falls Power Co. for not exceeding 19,500 cubic feet, being the aggregate of what had hitherto been allowed to that company and the said Hydraulic Power Co.

In 1920 Congress passed the water power act, supra, asserting control of the use of water in navigable waters for water power.

If the United States Government in entering into the treaty of May, 1910, with the British Government, by which it undertook to control and limit the use of the Niagara River for water power, was within the limits of its constitutional power, and if aside from this treaty, which is the supreme law of the land, Congress had constitutional power and had exercised it by the Burton Act and Federal Power Commission Act, supra, to control and limit the use of said waters for said power purposes, then the contention of the plaintiff that it had a vested right under sundry conveyances and the law and decisions of the courts of New York to take and use water from the Niagara River can not be sustained; and it would be extending this opinion beyond necessary limits to discuss these rights. Suffice it to say that whatever these rights may be under the law and decisions of New York, and the conveyances of title to plaintiff, we do not think that they can be asserted or are or can be of avail against the conclusion which we have reached as to the controlling effect, as far as this case is concerned, of the said treaty with Great Britain and action of Congress in exercising its power to control said waters.

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To sum up our conclusions: The Government did not, and did not intend to, take the plaintiff's property. If it be held that it took the property of the Niagara Falls Power Company, the loss of the plaintiff was inci-
441 dental to the exercise of a sovereign right. By the contract with the Niagara Falls Power Company the Government secured the distribution of the power of that company to individuals in aid of the prosecution of the war. If it be held that it did take the property of the Niagara Falls Power Company, it took it under a claim of right by virtue of the authority of the Constitution and the said acts of Congress giving it control of water power. It did not take control of the product and output of the Niagara Falls Power Company without its consent, but, on the con-[fol. 77] trary, with and by its consent, by contract, and not for the public use of the United States in its corporate capacity but for the use of certain citizens thereof in the aid of national security and defense.

Inasmuch as we hold that there was no taking, it is not necessary to pass upon the question whether the Lever Act applies or not and whether this court has jurisdiction.

The petition should be dismissed, and it is so ordered.

441 Green, Judge, and Booth, Chief Justice, concur.

Petition for Writ of Certiorari, filed in the Supreme Court of the United States, January 23, 1930 (281 U. S. 710).

IN SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 598

INTERNATIONAL PAPER COMPANY, Petitioner,

vs.

THE UNITED STATES, Respondent

Petition for Writ of Certiorari to the United States Court of Claims

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The International Paper Company prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled action, dismissing the petition and entering judgment against the petitioner for the cost of printing the record.

Statement of the Case

The petitioner sued in the Court of Claims for compensation under the Fifth Amendment on account of the tak-[fol. 2]ing for a public use during ten months in 1918 of its flowage rights in water diverted from the Niagara River.

In the fall of 1917 and for some years prior thereto the petitioner, a manufacturer of paper and paper products, owned and operated a paper mill at Niagara Falls, New York, near the Niagara River. The mill machinery was driven by water drawn from the main power canal of the Niagara Falls Power Company which tapped the Niagara River above the Falls of Niagara. The flowage rights of the petitioner were secured to it by certain deeds and leases from the Power Company dating back to 1896, which were duly recorded and sufficient to pass an estate in realty under the law of New York (Find. I and VIII; fol. 58, 59, 62, 63).*

* References to side folios of record.

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Between February 7, 1918, and November 30, 1918, the United States "by reason of the exigencies of the national security and defense" formally requisitioned all the water which the Power Company, the petitioner's lessor, was taking from the Niagara River, expressly undertaking to pay the lessor just and fair compensation therefor (Find. XI; fol. 65, 66). This requisition was made with full knowledge of the petitioner's rights as lessee and with the express intention of depriving the petitioner of its water rights (Find. X and XII; fol. 64, 65, 68). Accompanying the requisition but in a separate document there was a so-called "waiver," under which the Power Company waived compensation in consideration for being allowed to continue to sell power to certain designated war industries, among which the petitioner was not included (Find. XI; fol. 66, 67). As a result of the requisition, the petitioner was compelled to shut down its mill for ten months (Find. XIII; fol. 68, 69), which entailed an actual out-of-pocket expense of $304,685.26, as the Court of Claims [fol. 3] specifically found (Find. XXII; fol. 70).

At the time of the taking there was in existence a treaty between the United States and Great Britain limiting the amount of water which the nationals of both countries might take from the Niagara River for power purposes (Find. VI; fol. 61). There were also in effect certain licenses issued by the Secretary of War to the Power Company under the authority of the Burton Act, as extended by a series of joint resolutions, purporting to authorize the petitioner's lessor to take from the Niagara River for power purposes the water which it was taking. These licenses were revocable at will but were in fact never revoked during the period under consideration (Find. VII; fol. 61, 62).

Some two years after the asserted taking, namely, in June, 1920, the so-called Federal Water Power Act was passed, under which a Federal Power Commission was created and a system of licensing provided for. (41 Stat. 1063).

Questions Presented

The ultimate question is whether the petitioner as a matter of law is entitled to just compensation for the taking of its water rights at Niagara Falls on the facts specially found.

Specifically, the Court of Claims erred when it decided:

(1) That the treaty with Great Britain of May, 1910, had the effect of placing "the control of the water" (meaning, apparently, the proprietary interest in the water) of the Niagara River for power purposes in the Federal Gov- [fol. 4] ernment, that this right of control existed under the Constitution and that the Federal Government was exercising it by virtue of the Federal Water Power Act of June, 1920 (fol. 72, 73, 74). It is not clear what bearing the Federal Water Power Act had upon the case, since it was not passed until some two years after the taking.

(2) That without the license from the Government, or if the existing license had been revoked as it might have been (but in fact was not), the Power Company would have had no right to use the water, and the petitioner's rights as lessee were no better than those of the lessor. As a consequence, the Secretary of War in taking the water proceeded under a claim of right (fol. 73, 74). But if this were the case, it is hard to see why the requisition order contained an express promise to pay compensation for the taking.

(3) That the act of the Power Company in executing the waiver of compensation was a voluntary act which had the effect of depriving the petitioner of any right to compensation from the United States (fol. 75). It is not evident how this could be, since the petitioner was not a party to the waiver, nor did it consent thereto. Its rights as grantee and lessee were adverse to those of the Power Company. There was no identity of interest between the two.

(4) That which the Government took was the product of the Power Company and not its plant or the use of it, [fol. 5] and consequently the petitioner's "contract" was

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frustrated and the damages were incidental, citing Omnia Commercial Co. v. U. S., 261 U. S. 502, and distinguishing Duckett & Co. v. U. S., 266 U. S. 149 (fol. 75). In this the Court completely ignored the local law, for under the law and decisions of New York a lease of water rights constitutes a vested interest in the nature of realty.

(5) Finally, the Court concluded that in view of the treaty with Great Britain and the Federal Water Power Act the Federal Government had assumed "control" over the waters of the Niagara River for power purposes and consequently any vested rights which the Power Company or the petitioner as its lessee might have in the use of the water pursuant to the New York law and the decisions of the New York courts were wholly destroyed (fol. 76).

Reasons for the Petition

The writ prayed for should be allowed for the following reasons:

(1) The Court of Claims decided an important question of local law, namely, the character of the petitioner's water leases, in a way which not only was in conflict with the applicable decisions of the New York courts but completely ignored the local law as determined time after time by the New York Court of Appeals.

(2) The Court of Claims decided the Federal question involved in a way directly in conflict with the applicable decision of this Court, namely, Duckett & Co. v. U. S., 266 U. S. 149.

[fol. 6] (3) the Court of Claims decided an important question of general law in a way untenable and in conflict with the weight of existing authority in that it gave improper effect to a treaty with Great Britain and put controlling weight on an unnecessary and erroneous interpretation of the Federal Water Power Act passed some two years after the taking.

(4) The Court of Claims decided an important question of Federal law which has not been but should be settled

by this Court, when, contrary to the prevailing opinion among the bench and bar, it asserted that the Federal Government possesses a proprietary interest or control over the waters of a boundary stream, quite irrespective of any question of navigation.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Claims, and submits herewith a certified transcript of the record in the Court below in support of this petition.

Respectfully submitted.

International Paper Company, by John W. Davis, Montgomery B. Angell, Attorneys for the Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1930.

No. 37.

INTERNATIONAL PAPER COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Claims.

Summary of Argument of Petitioner (on Merits)—from Index of Brief on Behalf of Petitioner.

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THE TAKING WAS NOT ACCOMPANIED BY ANY REVOCATION OF THE FEDERAL LICENSE AND WAS NOT UNDER ANY CLAIM OF RIGHT.

The Court of Claims specifically found that the Federal licenses authorizing the Power Company to divert water

from the Niagara River remained in effect during the period of the taking and were never revoked (Finding VII, R. 53). In fact, one of those licenses terminated on July 1, 1918, precisely in the middle of the period during which the requisition order remained operative, and a new license was immediately issued the same day, running until July 30, 1919 (Finding VII, R. 52). The requisition order makes no reference to the licenses, but on the contrary in terms undertakes to pay "fair and just compensation". This express promise certainly negatives any argument that the taking was under any claim of right.

Nevertheless, in the Government's brief in opposition to our petition for certiorari, it is argued that the "substantial effect" of the requisition order was equivalent to a revocation of the Power Company's license. If the Government's present contention be sound, then both the petitioner and the Power Company were mere tenants at sufferance, and were liable to be evicted by the Federal authorities without compensation at a moment's notice, although they enjoyed vested property rights conferred upon them by the State of New York. If the whole proceeding amounted merely to such an eviction (as the Government now claims), why were the licenses not mentioned in the requisition order, and why did the Court of Claims expressly find that the licenses were never revoked or modified? If neither the Power Company nor the petitioner was entitled to compensation, why did the requisition order expressly undertake to pay compensation? If the making of the requisition order on December 28, 1917, amounted to a revocation of the license then in force, why did the Secretary of War renew that license as a matter of course when it expired six months later on July 1, 1918? Even if it be conceded that the rights of the Power Company or the petitioner were in any way dependent upon the existence of a Federal license, which we respectfully deny, the record is clear that in taking the property the Government did not proceed as by revocation of the license. This is certainly true with regard to the Power Company, both by reason of the fact

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that the licenses continued in effect throughout the period of the taking, and were in fact renewed during that period, and also by reason of the fact that the requisition order promised to pay compensation. This promise, when made with knowledge of the lessee's rights, and with the intention of depriving the lessee of those rights (as was the fact here), implies a promise to pay compensation to the lessee also.

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Opinion of the Supreme Court of the United States, January 19, 1931, 282 U. S. 399.

INTERNATIONAL PAPER COMPANY *v.* UNITED STATES

CERTIORARI TO THE COURT OF CLAIMS.

No. 37. Argued January 7, 1931.—Decided January 19, 1931.

1. Section 120 of the National Defense Act of 1916, which empowered the President, in time of war, to place obligatory orders with corporations for any product or material required, of the kind usually produced by them, was sufficient authority for taking the right held by a lessee to make use of part of the water in a power canal, such taking being accomplished by requisitioning from the power company owning the canal all the electrical power capable of being produced by the use of all waters capable of being diverted through its intake for its plants and machinery connected therewith. P. 406.

2. A requisition by the Government upon a power company for the production of all the electrical power capable of being produced through the full use of the waters of its intake canal, including the use to which a lessee of the company was entitled under rights which by state law were a corporeal hereditament and real estate, held a taking for public use of the water rights of such lessee, and that the latter is entitled to compensation therefor, notwithstanding that, by an agreement made between the Government and the power company at the time of the requisition, the Government waived delivery of the power on condition that it be distributed to certain designated private companies (of which the lessee was not one) for war uses, and the company waived all right to compensation if permitted to carry on its business and to sell its power consistently with the exigencies of the national security and defense. Omnia Commercial Co. v. United States, 261 U. S. 502, distinguished. P. 407.

3. Secretary of War, in making war-time requisition of electrical power generated by diversion of water from Niagara River, held not to have acted pursuant to powers in respect of navigation or under treaty, but to have exercised power of eminent domain. P. 407.

68 Ct. Cls. 414, reversed.

CERTIORARI, 281 U. S. 710, to review a judgment of the Court of Claims in favor of the United States in a suit against it to recover compensation for property rights in water alleged to have been taken for war purposes.

Mr. John W. Davis, with whom *Messrs. William C. Cannon, Montgomery B. Angell,* and *Porter R. Chandler* were on the brief, for petitioner.

The water rights of the petitioner were without doubt taken, and intentionally taken, during the ten months period in which the requisition order remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment, for which, if taken, compensation must be paid. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Wayne County*, 252 U. S. 574; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *North American Transp. Co.* v. *United States*, 253 U. S. 330; *James* v. *Campbell*, 104 U. S. 356; *Central Trust Co.* v. *Hennen*, 90 Fed. 593; *Williams* v. *United States*, 104 Fed. 50. See especially *Duckett & Co.* v. *United States*, 266 U. S. 149. *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, distinguished.

The taking was not accompanied by any revocation of the federal license, and the express promise to pay just compensation negatives any taking under a claim of right.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its rights to compensation in respect of its own property.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring proprietary

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rights under the laws of the State of New York to the Federal Government.

The taking of petitioner's water rights was pursuant to statute, and was not the mere private or tortious act of the Secretary of War. The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of the legislation. This is particularly true of a war-time authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Imp. Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255. Cf. *Maresca* v. *United States*, 277 Fed. 727, 735, certiorari denied 253 U. S. 498.

If there was any defect in authority under the National Defense Act, there was, we believe, ample authority for the taking under the Urgent Deficiency Appropriation Act of April 17, 1917, c. 3, 40 Stat. 28. Urgent Deficiency Act of December 15, 1917, c. 3, 40 Stat. 429.

When the requisition order was made, the Government had full knowledge of petitioner's rights—had, in fact, taken some pains to inquire as to the extent of those rights —and specifically intended to appropriate petitioner's property. The requisition order was a peremptory command,—an act of sovereignty and not an offer to negotiate. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220. By its terms, the Secretary of War undertook to make the requisition in the name of the President "and by reason of the exigencies of the national security and defense."

The Government attempts to argue that petitioner's only remedy is an action sounding in tort against the Power Company. Such an action would be met at the threshold with the answer that the shut-off of petitioner's water was not effected by the Power Company, but by the United States Government, acting pursuant to statutory authority.

The taking of petitioner's water was not a mere "regu-

lation" but was a substantial deprivation of property, for which compensation must be paid.

Petitioner is entitled to interest as a part of the just compensation guaranteed to it by the Constitution.

Mr. Claude R. Branch argued the cause and *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Erwin N. Griswold* and *H. Brian Holland* filed a brief for the United States.

It does not appear that the alleged taking of petitioner's water rights was, expressly or by necessary implication, authorized by legislative enactment, and in the absence of such authorization, petitioner is without recourse against the United States.

Several statutes, such as the National Defense Act, gave the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these that the Secretary of War assumed, in behalf of the President, to requisition the output of the power plant. But the grant of authority merely to requisition the product of a power plant does not authorize the taking of water power from a third party in order to increase the productive capacity of the plant.

It does not appear that the President or the Secretary of War was entitled to requisition anything other than electric power which the Power Company could produce by means of facilities and materials over which it had control. *Duckett & Co.* v. *United States,* 266 U. S. 149, distinguished.

The *res* which was taken was "the total quantity and output of the electrical power," and not the use of waters diverted or capable of being diverted through the canal. The Government did not want water power, and did not take it. It did intend that use should be made by the Power Company of water theretofore used by the Paper Company. But it does not follow from this that the Government intended to expropriate the water. The petitioner was advised of the contents of the requisition order, but it

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was not directed or requested to relinquish its water rights either to the United States or to the Power Company. Thus there was no physical taking by the United States of any property belonging to the Paper Company, and the case is distinguishable from *Duckett & Co.* v. *United States, supra.*

The execution of the waiver precludes the idea of there having been any appropriation by the United States even of the power produced by the Power Company. Ultimately the Government took nothing and assumed only to regulate the selection of the Power Company's sale of its product to essential industries. If, as petitioner argues, electrical power is the *alter ego* of water power, then since the Government did not take electricity it did not take water.

There can be no recovery under the Fifth Amendment unless property is actually taken and used by the sovereign for a public purpose, *Legal Tender Cases,* 12 Wall. 457; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; *Wisconsin M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146.

The jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property must rest on the receipt of a consideration moving to the United States. *Bothwell* v. *United States,* 254 U. S. 231; *Interocean Oil Co.* v. *United States,* 270 U. S. 65, 69.

This case, although not necessarily controlled by *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, is more closely comparable to it than to the *Duckett* case.

The interference with petitioner's property was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Coal Co., Inc.* v. *United States,* 259 U. S. 191; *Atwater & Co.* v. *United States,* 275 U. S. 188.

This Court has repeatedly held that the sovereign may, in the exercise of governmental powers, promulgate regulations and impose restrictions amounting in substance to

a deprivation or even complete destruction of property rights. *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467; *United States* v. *Delaware & H. Co.,* 213 U. S. 366; *Morris* v. *Duby,* 224 U. S. 135; *Tagg Bros.* v. *United States,* 280 U. S. 420.

If the petitioner is entitled to recover for the taking, it is not entitled to interest.

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The Niagara Falls Power Company by private grant to it, Letters Patent from the States of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate.

On December 28, 1917, the Secretary of War wrote to the Power Company that "The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defence, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith." Immediate and continuous delivery of such power was directed and it was added "You will be paid fair and just compensation for power delivered hereunder." At

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the same time an agreement was made by the Secretary of War and the Power Company, (reciting that the President has requisitioned the power as above,) to the effect that the Secretary of War "acting for and in behalf of the United States" until further notice waives delivery of the power to the United States on the express condition that the Power Company shall distribute such power as provided in a schedule naming companies and amounts but not naming the petitioner, and on the other side the Power Company waives all right of compensation by reason of said requisition if permitted to carry on its business and to sell consistently with the exigencies of the national security and defence. On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company "Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. . . . This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity" and on December 31 telegraphed to the counsel of the petitioner "Power Company has been directed to take water hitherto used by International Paper Co." The petitioner had been notified of what was to happen but was allowed time to run out its stock on hand. On February 7, 1918, its use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.

The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts,

we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

Then it is said that there was no taking, but merely a making of arrangements by contract. But all the agreements were on the footing that the Government had made a requisition that the other party was bound to obey. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220. It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It prom-

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ised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps* v. *United States*, 274 U. S. 341, 343. *Campbell* v. *United States*, 266 U. S. 368, 370, 371. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656. Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfill its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power.

We perceive no difficulty arising from the case of *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30.

Judgment reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS are of opinion that the judgment of the Court of Claims should be affirmed.

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MISSING PAGE

Monday, November 26, 1951.

* * * * *

Before WILBUR K. MILLER and BAZELON, Circuit Judges, and KIMBROUGH STONE, Circuit Judge, Sitting by Designation

* * * * *

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

The Court granted the informal requests of both parties and allowed one hour on each side for oral argument.

Argument commenced by Mr. John W. Davis, attorney for petitioner, at 10:38 to 11:40. The Court took a short recess. Argument concluded by Mr. Willard W. Gatchell, attorney for respondent, at 11:50 to 12:58.

* * * * *

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 31, 1952. Joseph W. Stewart, Clerk

United States Court of Appeals for the District of Columbia Circuit

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Order of the Federal Power Commission

Decided December 31, 1952

Mr. John W. Davis, with whom *Messrs. Randall J. LeBoeuf, Jr.*, and *Chauncey P. Williams, Jr.*, were on the brief, for petitioner. *Mr. Craigh Leonard* also entered an appearance on behalf of petitioner.

Mr. Willard W. Gatchell, Assistant General Counsel, Federal

Power Commission, with whom *Mr. Bradford Ross*, General Counsel, Federal Power Commission, was on the brief, for respondent.

Before KIMBROUGH STONE, Circuit Judge, Retired (Sitting by Designation), and WILBUR K. MILLER and BAZELON, Circuit Judges

Per CURIAM:

The question on this review is whether the Federal Power Commission correctly determined the amortization reserve liability, under § 10(d) of the Federal Power Act, of a water power licensee.

Long prior to the enactment of the Federal Water Power Act of 1920, 41 STAT. 1063,* the Niagara Falls Power Company was the owner of plants on the Niagara River which utilized water from that stream in generating electric energy. It had certain water rights which will be more fully described hereinafter. After the passage of the Act of 1920, the Power Company applied to the Federal Power Commission for a license under the new statute to cover the operation of its existing plants and others then under construction. Such a license, which designated the plants as Project No. 16, was issued by the Commission on March 2, 1921.

Section 10(d) of the Act conditions such licenses by providing:

> "That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment . . . the licensee shall establish and maintain amortization reserves . . ."

The reserve so established must either be held until the termination of the license or be applied from time to time to reduce the net investment, as the Commission may direct. The license for Project No. 16 specifies a six per cent return, and provides that one-half of any surplus earnings in excess thereof shall be paid into and held in an amortization reserve.[1]

Acting pursuant to § 10(d), the Federal Power Commission, on March 15, 1949, ordered the Niagara Falls Power Company to show cause within thirty days "why the Commission should not find, determine and direct that" surplus earnings of Project No. 16 in the sum of $994,521.33 for the period from March 2, 1941, to Decem-

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* This Act is now Part I of the Federal Power Act, 16 U. S. C. §§ 791 *et seq.*

[1] If the United States should take over Project No. 16 at the end of the license period, pursuant to § 14 of the Act, such amortization reserve may be deducted from original cost in determining the amount to be paid the licensee.

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ber 31, 1946, (the initial period) be set aside in an amortization reserve, and that the method used by the Commission in computing surplus earnings for that initial period be employed in determining surplus earnings for succeeding years. The Company resisted, claiming the reserve should be only $515,432.04.

After hearings, the Commission made a slight reduction in the amount of surplus earnings suggested in the show cause order, and on September 27, 1950, entered an order directing, among other things, that Niagara Falls Power Company place in an amortization reserve the sum of $914,432.04 as one-half of surplus earnings from March 2, 1941, to December 31, 1946.

In fixing that figure the Commission increased the Power Company's computation of its amortization reserve liability by $399,000. This was the result of two findings and conclusions: (a) the Commission disallowed as operating expense the Power Company's annual payment of $99,000 to International Paper Company for the right to use 730 cubic feet per second (cfs) of water for power development,—a water right which had been conveyed to the Power Company by the Paper Company by defeasible grant which reserved that yearly payment. The total disallowance for the initial period on this score was $577,500. (b) The Commission artificially increased the Power Company's revenue for the initial period by $220,500, by disallowing a rate concession amounting to that sum which had been given by the Power Company to its parent, Buffalo Niagara Electric Corporation, as the consideration for the right to use 262.6 cfs of water for power development—the "Pettebone-Cataract" water rights—which it had acquired from Buffalo Niagara by contract.

These two adjustments increased the Power Company's surplus earnings for the initial period by $798,000. One-half of that sum—$399,000—is the amount by which the Commission's order increased the required amortization reserve. The Commission's order which disallowed the rate concession to Buffalo Niagara and the payments to International Paper during the initial period also required that they be disregarded in computing amortization reserve liability during the remainder of the license period.

On October 19, 1950, Niagara Mohawk Power Corporation became, through a merger, the owner of all the assets of Niagara Falls Power Company and succeeded it as licensee of Project No. 16, so becoming subject to the Commission's order of September 27, 1950, which we have just described. In a petition for review, the successor licensee asks us to modify the Commission's order by holding that Buffalo Niagara and International Paper have valid water rights for the use of which it is obligated by contract to give the considerations which the Commission has disallowed; and asks us to reduce accordingly the required amortization reserve, both for the initial period and the remainder of the license term.

There is no dispute about the facts. Niagara Mohawk's remote predecessors in hydraulic power development at Niagara Falls constructed a canal, which was completed in 1861, tapping the Niagara River nearly a mile above the Falls and conveying water to a canal basin on the High Bank of the river approximately one-half mile below the Falls. The proprietors of the canal conveyed various mill sites to others with rights to use water for generating power. This water was drawn not from the river but from the canal basin. The general method of power development at that time was to sink shafts or pits at the edge of the cliff under the mills, and to use water from the canal to drive turbines at the bottom of the pits. After such use the water escaped through tunnels to the face of the High Bank and thence back into the river.

The petitioner's later predecessors, as a part of the program of developing and disposing of electric energy, continued the policy of purchasing various tracts of land in the vicinity of their power facilities to be sold or leased to industrial power customers, sometimes with the right to use water to develop power. Out of this practice arose the two water rights involved in this proceeding. A description of the principal branches of the "family tree" of Niagara Mohawk Power Corporation will aid in understanding the origin and history of these rights.

1. Niagara Falls Hydraulic Power and Manufacturing Company, organized in 1876, was succeeded in 1910 by Hydraulic Power Company of Niagara Falls.

2. The original Niagara Falls Power Company was organized in 1886.

3. Cliff Electrical Distributing Company was organized in 1909.

4. On October 31, 1918, Hydraulic Power, the original Niagara Falls Power Company, and Cliff were consolidated into a single corporation called Niagara Falls Power Company.

5. Through merger, the consolidated Niagara Falls Power Company was succeeded by Niagara Mohawk on October 19, 1950.

The International Paper Company issue.

The Niagara Falls Power Company leased to the Soo Paper Company in 1891 a tract of land on the bank of the Niagara River immediately downstream from its power house and adjacent to its intake canal. The lease gave the Paper Company the right to take and use water, either from the Niagara River at a point opposite the leased parcel or from the intake canal of the Power Company, in an amount sufficient to develop 3,000 horsepower, and gave the lessee the right to discharge such water through the tunnel of the Power Company, which returned it to the river below the Falls.

On March 7, 1896, the Power Company conveyed the premises so leased, consisting of approximately 11.75 acres of land and land

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under water, and the right to take, use and discharge water, to Niagara Falls Paper Company, successor to the Soo Paper Company. The conveyance of the premises was subject to an annual rental of $24,000 for the right to take and use water sufficient to produce 3,000 horsepower, which was held to be 300 cfs "when the fall available on said property shall be 120 feet." Later in the year 1896, by agreement of the parties, the Paper Company increased its taking of water to an amount sufficient to develop 7,200 horsepower. In 1898 the Niagara Falls Paper Company conveyed the land and water rights so acquired by it to International Paper Company. The Power Company consented to the conveyance, and confirmed to International Paper all the grants and rights which were being transferred to it. International Paper continued the diversion and utilization of water under that grant and, in the winter of 1917-18, was taking from the Power Company's intake canal, and using, approximately 730 cfs.

Under the Burton Act of 1906 and subsequent Congressional joint resolutions, the Secretary of War authorized the Power Company to divert from the Niagara River 8,600 cfs, which included the 730 cfs taken by International Paper Company from the Power Company's intake canal. In 1917-18 the Secretary permitted the Power Company's diversion of water to be increased to 10,000 cfs. But in December, 1917, the Secretary of War requisitioned the entire power output of the plants at Niagara Falls and required the Power Company to utilize through its own facilities the 730 cfs of water theretofore diverted by the International Paper Company. As a result the latter was deprived of the right to take that water for a period of more than nine months in the year 1918. This incident gave rise to litigation, to which further reference will be made hereinafter.

The right of International Paper to 730 cfs of water was acquired by the new Niagara Falls Power Company in 1919. The transfer came about in this way: by a contract of March 1, 1919, the Power Company agreed to furnish to International Paper a specified amount of electric energy, and International Paper granted and released to the Power Company all its rights to take from the Niagara River or the intake canal water for use in the development of power. But the grant was conditioned upon the continuance of the supply of the specified amount of electric energy by the Power Company. If that should fail for a period of 90 days, International Paper had the option to revive its right to take and use 730 cfs of water. International Paper agreed to pay for electric energy furnished by the Power Company at the rate of $20.00 per electrical horsepower per annum, but it was agreed that International Paper should be credited for the water rights granted, released and surrendered with a sum sufficient to reduce the charges against it to $76,000 per annum.

In 1937 the Power Company filed with the New York Public Service Commission a rate schedule for sales of electric power to industrial customers, after which the Power Company and International Paper made a new agreement which amended the 1919 contract in order to conform to the new rate schedule. Thereafter International Paper paid for electric energy at the rates prescribed by the tariffs in effect from time to time; but, in order to compute the "fair and reasonable annual use or rental value" of the 730 cfs of water which had been conditionally released by International Paper, the 1937 agreement contained a formula which produced as the rental value of the 730 cfs of water $82,500 for the period from March 1 to December 31, 1941, and $99,000 for each of the years from 1942 to 1946, both inclusive. These are the sums, actually paid by the licensee for the International Paper rights, which have been disallowed by the Federal Power Commission as operating expense deductions in the amortization reserve computation.

The Buffalo Niagara (Pettebone-Cataract) issue.

Certain mill sites and appurtenant water rights were acquired by the Pettebone-Cataract Paper Company and the Cataract City Milling Company, which are referred to in the record as the Pettebone-Cataract companies. Some sixty years ago those companies and Niagara Falls Hydraulic Power and Manufacturing Company, which was then proprietor of the hydraulic canal, were in dispute as to the nature and extent of the water rights. They settled their differences by means of a contract dated January 1, 1900, which fixed the amount of water to which the Pettebone-Cataract companies were entitled at 262.6 cfs at a head of 100 feet. This was only a partial head, as the basin was about 215 feet above the river level below the Falls; so the proprietor reserved the right to enter on the Pettebone-Cataract lands and to construct a tunnel under the High Bank to collect the water discharged by those companies and utilize it through the remaining 115 feet of fall.

It was not until 1914, however, that Hydraulic Power Company, which in the meantime had become proprietor of the canal, proposed to construct the tunnel contemplated by the 1900 agreement and thereby to utilize, through the remaining head of 115 feet, the water diverted by the Pettebone-Cataract companies. Those companies refused to permit such construction, as a result of which the Niagara Falls Power Company, which by then had succeeded Hydraulic Power Company, sued to enjoin them from interfering. The New York courts upheld the right of the Power Company to construct upon the Pettebone-Cataract lands facilities necessary to utilize the remaining head and awarded damages of approximately $172,000 against the Pettebone-Cataract companies for their breach of the 1900 contract. *Hydraulic Power Company v. Pettebone-Cataract*

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Paper Company, 183 N. Y. Supp. 373 (1920), *affirmed* 191 N. Y. Supp. 12 (1921).

While the litigation just described was in progress, the Federal Water Power Act was enacted on June 10, 1920. The Power Company applied for a license thereunder and set forth the construction necessary to utilize the outfall of the turbines of the Pettebone-Cataract companies through the remaining head of 115 feet. During the pendency of the appeal in the litigation between the Power Company and the Pettebone-Cataract companies, the Federal Power Commission issued to the former the Project No. 16 license which is here involved. The license contains the following:

> "13. In the event the United States or a new licensee shall take over the project of the licensee pursuant to the provisions of the Act,
>
> * * * * *
>
> "Such taking over of the project shall also be subject to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the rights, if any, of International Paper Company."

The hydraulic structures which the Power Company proposed in its license application were constructed, and from September 6, 1922, until June 21, 1925, the Power Company actually used the 262.6 cfs of water under the head which remained available after utilization by the Pettebone-Cataract companies.

In 1925 the properties of Pettebone-Cataract companies, including lands, buildings, machinery and water rights, were sold to Niagara Lockport and Ontario Power Company. As a part of the consideration therefor, Niagara Lockport assumed the judgment debt owed to Niagara Falls Power Company by the Pettebone-Cataract companies. Thereafter Niagara Lockport conveyed to Niagara Falls Power Company the lands, buildings, plant and machinery (but not the water rights) in satisfaction of the judgment debt which it had assumed. The Power Company accepted the conveyance as extinguishing the debt. Simultaneously it leased the water rights from Niagara Lockport and, as the consideration therefor, agreed to furnish Niagara Lockport a stated amount of electric energy, for which the latter was to pay a charge initially fixed at $6.70 per kilowatt per annum, this being substantially lower than the rate for electric energy which then prevailed at Niagara Falls.

These transactions were consummated by writings dated May 21, 1925, and thereafter for twenty years Niagara Falls Power Comapny utilized the 262.6 cfs of water, covered originally by the Pettebone-

Cataract rights, for the generation of hydraulic electric power under a head of 215 feet.

Niagara Lockport was succeeded in 1945 by Buffalo Niagara Electric Corporation, which thereupon became entitled to the former's rights under the deed and agreement of May 21, 1925. Buffalo Niagara also became the owner of all the capital stock of Niagara Falls Power Company. It was then proposed that Buffalo Niagara sell to the Power Company its rights in the 262.6 cfs for $728,415.48, the cost to Niagara Lockport when it acquired the water rights from the Pettebone-Cataract companies. The New York Public Service Commission approved and authorized the transfer on February 5, 1947. After such approval the companies filed a declaration with the Securities and Exchange Commission, under § 12(d) of the Public Utility Holding Company Act of 1935, for consent to or approval of the transaction as a sale of utility assets; and on February 28, 1947, that Commission entered an order permitting the declaration to become effective.

The Power Company requested the Federal Power Commission to agree to the amendment of paragraph 13 of Project No. 16 license, quoted above, so as to record the effect of its acquisition of the Pettebone-Cataract water rights from Buffalo Niagara, by eliminating therefrom the reference to "rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, . . ." The Power Commission, in an order accompanied by its Opinion No. 159, denied the proposal for amendment on November 17, 1947, saying,

> "In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States v. Chandler-Dunbar*, 229 U. S. 53, 66. . . . The licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law."

Thereafter the Niagara Falls Power Company advised the Power Commission that

> ". . . while it does not agree with the reasoning or conclusions contained in Opinion No. 159, no application for rehearing will be made from the order denying the application for amendment of license . . .
>
> "It is the Company's position that its failure to apply for a rehearing or to renew the application is without prejudice to its right to contest the legal conclusions contained in Opinion

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No. 159, should the matter arise in concrete form in any subsequent proceeding."

The Commission's letter in response stated its opinion that, by electing not to seek a rehearing and court review, the Niagara Falls Power Company had "waived any further question that it may have had concerning the legal conclusions contained in Opinion No. 159."

The legal conclusion in its Opinion No. 159, quoted above, is the basis of the Federal Power Commission's reliance upon the doctrine of *res judicata* in the present case, thus stated in its brief:

> "In its decision and order of November 21, 1947 the Commission found, among other things, that Licensee was authorized by its Federal Power Act license to use the water in question for power development through Project No. 16 and that Buffalo Niagara Electric Corporation had no such authority and had no water power rights to sell.
>
> "In its decision and order issued September 27, 1950 (A. 105), which is here under review, the Commission rejected the proposed inclusion in the project accounts: (1) of rental payments of $37,800 annually to Buffalo Niagara Electric Corporation for the use of water covered by the so-called Pettebone-Cataract water right claim; and (2) annual rental payments of $99,000 to International Paper Company for use of water rights claimed by the latter company for power development. Consequently, the question in the Commission's order of September 27, 1950 concerning the water right claims was in substance the same as that decided by the Commission on November 21, 1947 (A. 108-110), and the Commission's first decision was determinative of that question. *Landreth* v. *Wabash R. Co.* (C. A. 7, 1946) 153 F. 2d 98, 99-100; *Mulcahy* v. *Public Service Commission* (Utah, 1941) 117 P. 2d 298, 302-304."

Whether its order of November 21, 1947, was reviewable under § 313 of the Federal Power Act may well be doubted, since it amounted to nothing more than a refusal to agree to the licensee's proposal that the license be amended.[2] To agree or not was purely within the discretion of the Commission, and its refusal to do so could not have been reviewed except perhaps on the ground that

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[2] A license issued under Part I of the Federal Power Act may not be altered except by agreement between the Federal Power Commission and the licensee. (§ 6 of the Act) The Commission has no power, acting alone, to amend or in any way change an outstanding license.

it was an arbitrary abuse of discretion. The mere fact, therefore, that the Commission recited a legal conclusion as its reason for refusal did not necessarily make the order itself subject to judicial scrutiny. But, whether so or not, we do not think the Commission can preserve from judicial examination a possibly erroneous legal ruling by embalming it in *res judicata*. This court, speaking through Chief Justice Groner in *Churchill Tabernacle v. Federal Communications Commission*, 81 U. S. App. D. C. 411, 160 F. (2d) 244 (1947), described as well settled the doctrine that "*res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals."

We are of the opinion that the Commission's plea of *res judicata* must be rejected and that the main issues are open to examination. Those issues are: (a) the validity *vel non* of the International Paper and Pettebone-Cataract water rights under the law of New York; and (b) how those rights were affected by the Federal Water Power Act of 1920.

I

We have noted that, in its Opinion No. 159, issued in 1947, the Federal Power Commission said:

> "In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States."

This continues to be the Commission's basic contention with respect to the Pettebone-Cataract (Buffalo Niagara) water rights, and the International Paper rights as well. We observe, however, that the water rights in question do not rest upon a claim of ownership of the running waters of the Niagara. It is a usufructuary property right in the waters which is asserted—a vastly different thing, which was recognized at common law and has been confirmed by judicial decisions.

The distinction between absolute ownership of flowing waters and the right to use them temporarily was aptly stated in *Sweet* v. *City of Syracuse*, 129 N. Y. 316, 335, 27 N. E. 1081, 1084 (1891):

> ". . . It is a principle, recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes, (2 Bl. Comm. 18:) 'Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property

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> therein.' While the right of its use, as it flows along in a body, may become a property right, yet the water itself, the *corpus* of the stream, never becomes, or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, . . ."

So, although neither Buffalo Niagara, nor International Paper, nor Niagara Mohawk has any title to the water flowing in the Niagara, the question is whether they have "a temporary, transient, usufructuary property therein." That depends upon the law of New York because, as the Supreme Court said in *United States v. Chandler-Dunbar Company*, 229 U. S. 53, 60 (1913):

> "The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law."

Under the law of New York a riparian owner's right to use the waters of a stream for power purposes is a part of his estate, *United P. B. Company v. Iroquois P. & P. Company*, 226 N. Y. 38, 123 N. E. 200 (1919); *Waterford Electric Light, Heat and Power Company v. The State of New York*, 208 App. Div. 273, 203 N. Y. Supp. 858 (1924), *affirmed* 239 N. Y. 629, 147 N. E. 225, and is a corporeal hereditament, *Van Etten v. The City of New York*, 226 N. Y. 483, 124 N. E. 201 (1919).

This usufructuary right is an incident to riparian ownership and does not depend upon grant or prescription. It is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor; but, until the State exercises its paramount right, the riparian owner's usufructuary right is unimpaired. These principles were stated by the New York courts in *People* ex rel. *Niagara Falls Hydraulic Power and Manufacturing Company v. Smith*, 70 App. Div. 543, 75 N. Y. Supp. 1100 (1902), *affirmed* without opinion 175 N. Y. 469, 67 N. E. 1088 (1903), with express reference to the water rights from which those in question here derive. The court said that Niagara Falls Hydraulic Power, one of Niagara Mohawk's predecessors,

> ". . . as a riparian owner and as owner of the lands under the waters of the Niagara River adjacent to its uplands from which the water is immediately taken, has the right to *use* of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it

> does, after passing over its own lands [citations], subject only to the paramount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream; such right being in no sense in the nature of a franchise, but a corporeal hereditament, not depending either upon grant or prescription." (Emphasis supplied)

Since the usufructuary property right of Niagara Falls Hydraulic and its successors was and is subject to the superior right of the State of New York, in order to see whether the right still exists it is necessary to ascertain whether the State has exercised its paramount authority and, if so, to what extent.

Activity of the State began with an Act of 1886 which authorized diversion for manufacturing purposes, limited only to non-interference with navigation. The first limitation as to quantity was imposed by Chapter 513 of the laws of 1892, which gave the Niagara Falls Power Company the right to take and use the waters of the Niagara River to the extent required for the proper operation of its authorized facilities, provided that nothing contained in the act should be construed to confer any right to obstruct the navigation of the Niagara River, or to take therefrom more water than sufficient to produce 200,000 effective horsepower. Chapter 968 of the Laws of 1896 authorized the Niagara Falls Hydraulic Power & Manufacturing Company to use the waters of the Niagara River to develop power and to sell it to others, limiting the use to such quantity of water as might be drawn by means of the company's hydraulic canal when enlarged throughout its entire length to a width of 100 feet and to a depth and slope sufficient to carry at all times a maximum uniform depth of 14 feet of water, provided the exercise of the rights should not impair the practical navigation of Niagara River.

Chapters 596 and 597 of the Laws of 1918 further regulated the use of the waters of the Niagara; they permitted the Cliff Electrical Distributing Company, the Niagara Falls Power Company, and Hydraulic Power Company of Niagara Falls to consolidate, and permitted the new corporation to divert the water of the Niagara River for the development of power, with this proviso:

> "Provided further that if the corporation constituted by such consolidation shall divert from the Niagara river for power purposes more than fifteen thousand one hundred cubic feet per second there shall be reserved to the state the right to charge an equitable rental therefor in such amount and in such manner

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> as shall hereafter be provided by law; and provided further that nothing in this act shall be construed as giving the right to discharge water into the Niagara river at a point more than one thousand feet below the lowest point of discharge into such river by any of the corporations so consolidated as now fixed. Nothing in this act shall be construed to waive or alienate any right now vested in the state as to waters now being diverted by any of such corporations so consolidated, or to compensation for said rights."

An amendment in 1943 to the State Conservation Law, Chapter 46 of the Laws of 1943, required a rental to be paid for the use of the initial 15,100 cfs which the 1918 act had permitted to be rent free.

From the various legislative enactments to which we have referred, it is seen that New York has exercised its sovereign paramount authority to regulate the use of Niagara waters by restricting the original riparian rights upon which the Pettebone-Cataract and International Paper rights depend. It has limited the quantity of water which may be used, and has exacted a rental charge for its use. But the legislature has not destroyed the riparian rights, as it might have done by pre-empting the entire available flow; rather it has confirmed the rights as limited and defined in the several statutes.

This view is reflected in judicial opinions. In *Hydraulic Power Company of Niagara Falls v. Pettebone-Cataract Paper Company*, 198 App. Div. 644, 191 N. Y. Supp. 12 (1921), the court described the Pettebone-Cataract water rights by saying:

> "The [Pettebone-Cataract companies] by mesne conveyances (the details of which are not of controlling significance) are respectively the owners of certain water rights, by virtue of which they take and have for years taken quantities of water from such basin and conducted the same to turbines upon their properties and thereby generated electrical power for their own private uses."

Thus in 1921, with all the New York statutes through 1918 before it, the court found the Pettebone-Cataract water rights still existent.

The validity of the International Paper water rights under State law was recognized by the Supreme Court in *International Paper Company v. United States*, 282 U. S. 399, 404 (1931). This was a proceeding brought by International Paper in the Court of Claims to recover compensation for the right to use 730 cfs of water from the Niagara River, which was temporarily taken by the United States for war purposes, as we have described above. The Court of Claims denied recovery, but the Supreme Court reversed and, in

the course of its opinion, described the International Paper water rights as follows:

> ". . . The Niagara Falls Power Company by private grant to it, letters patent from the state of New York and acts of the legislature of that state, was the owner . . . of land and water rights on the American side of the river above the Falls. Included in them was a power canal through which the power company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate."

It is significant that the quoted language was written by the Supreme Court long after the Federal Water Power Act became law, and when all New York statutes through 1918 were in effect.

The Federal Power Commission argues, however, that the 1943 amendment to the State Conservation Law, which required rental for the use of the first 15,100 cfs diverted by Niagara Falls Power Company (theretofore free of rent), destroyed the private rights in issue here. It cites in supoprt of the argument *Niagara Falls Power Company v. Duryea*, 57 N. Y. S. (2d) 777 (1945). The case is inapposite, for the court simply sustained the further imposition of water rentals. That holding was not destruction, but confirmation, of the private rights.

In summing up this argument that the water rights asserted here do not exist under the law of New York and should not be recognized by this court, the Power Commission assigns three reasons for its position: (a) "there can be no perpetual right to use the water of a navigable river"; (b) "any permission given by the State may be withdrawn at any time when the State so decides, without compensation for the loss of the privilege"; and (c) "It has not been shown that either Buffalo Niagara or International Paper Co. held authority from the State Water Power and Control Commission to use the water from March 1 [*sic*], 1941, to December 31, 1946." None of these reasons supports the Commission's conclusion.

As to reason (a) quoted above, we have shown that riparian water rights are property rights subject only to the reserve power of the state and national governments to restrict or destroy them. Reason (b) quoted above, while an accurate statement of principle, does not justify the conclusion that the water rights do not eixst. The question is, not what the state may do, but what it has done; for we have seen that riparian rights continue unimpaired until the state asserts its superior authority. It must also be true that, when the state takes regulatory action which limits, but does not destroy, the

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private water rights, those rights continue to exist subject to the limitation imposed. Reason (c) quoted above apparently assumes that the water rights which are claimed did not exist during the initial period from March 2, 1941, to December 31, 1946, unless it could be shown—as it was not—that Buffalo Niagara and International Paper had been licensed during that period by the State Water Power and Control Commission to use the quantities of water covered by their rights.

In considering the validity of the Commission's reason (c), we must ascertain whether a license from the Water Power and Control Commission was a statutory prerequisite to the exercise of the rights during the initial period. The answer is found in a New York decision and in the 1943 amendment to the New York Conservation Law.

The New York Water Power and Control Commission instituted an action in 1937 to enjoin Niagara Falls Power Company from diverting the basic 15,100 cfs on the ground that it had not obtained a license to do so, as the Commission thought the Conservation Law required. That law then declared diversion of water from the Niagara for power or other commercial purposes to be unlawful except under a license from the Water Power and Control Commission or by virtue of a "right lawfully and previously acquired."

The Appellate Division dismissed the action, referring to the cases which hold that a riparian owner's right to divert and use water from a navigable stream is a property right, and referring also to the New York statutes confirming the water rights of Niagara Falls Power Company. It was held that those rights, although subject to the reserve powers of the State, exempted Niagara Falls Power Company from the licensing provision of the conservation Law as to the basic 15,100 cfs because the Power Company's right to use that initial quantity had been "lawfully and previously acquired." *Water Power and Control Commission v. Niagara Falls Power Company*, 262 App. Div. 460, 30 N. Y. S. (2d) 371 (1941), *affirmed* 289 N. Y. 353, 45 N. E. (2d) 907 (1942). It follows that a State license was not required under the Conservation Law as it then existed.

In 1943 the Conservation Law was amended. The exception accorded to a "right lawfully and previously acquired" was eliminated, and any diversion from the Niagara for power or other commercial purposes was made "subject to the charging or imposition of an equitable rental . . ." It was provided that, after July 1, 1943, an equitable rental would be charged on the diversion of the basic 15,100 cfs. After that date, therefore, the exercise of all the petitioner's water rights was subject to the payment of rental to the State and the exemption from the licensing requirement as a "right lawfully and previously acquired" no longer existed. It should be noted, however, that by a provision of the 1943 amendment, a State license is not required for the diversion of waters for which a rental

is exacted. Thus at no time during the period from March 2, 1941, to December 31, 1946, was it necessary that a license be obtained from the State Commission prior to exercising these water rights.

We hold that the International Paper and Pettebone-Cataract water rights are valid under the law of New York. How they have been affected by the Federal Water Power Act of 1920 remains for consideration.

II

In the foregoing section of this opinion, was examined the question whether the petitioner's usufructuary property right in the waters of the Niagara has been destroyed or impaired by the State of New York in the exercise of its paramount authority. We concluded that the water rights in question have been limited and regulated by the State but still exist to the extent claimed, which is well within the limitation imposed. Since the petitioner's usufructuary right was and is also subject to the superior right of the national government, in order to see whether the property right still exists it is necessary to ascertain whether Congress has exercised its paramount authority and, if so, to what extent.

So we turn to the question whether the Federal Water Power Act, which became law on June 10, 1920, destroyed the International Paper and Pettebone-Cataract water rights theretofore and now valid as far as the law of New York is concerned. The Federal Power Commission argues that it did; that thereafter the right of Niagara Falls Power Company to use Niagara waters for power purposes derived from the license granted to it in 1921 under the federal statute, and from no other source.

In support of this proposition the Power Commission cites *United States v. Chandler-Dunbar Company*, 229 U. S. 53 (1913). A review of the factual situation and the statute involved in that case will show it is not authority for the respondent Commission's position.

Prior to 1909 the Chandler-Dunbar Company owned uplands on the American shore of the St. Marys River and so had technical title, under the law of Michigan, to the abutting bed of the river from the bank to the middle thread of the stream. It had installations for the development of power and used the river's waters for that purpose, under its rights as a riparian owner and pursuant to a revocable permit from the Secretary of War. By an Act of March 3, 1909, 35 Stat. 815, Congress declared (at page 820)

> ". . . That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith."

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The Secretary of War was directed immediately to acquire by condemnation or otherwise all the lands and property which the Act described as necessary for the purposes of navigation. It was further provided that

> "Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company, . . . shall cease and determine and become null and void on January first, nineteen hundred and eleven . . ."

All Chandler-Dunbar power installations were accordingly condemned, and a substantial allowance was made for its water rights in the St. Marys. On appeal, the Supreme Court noted the principal question to be

> ". . . whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been 'taken,' and for which compensation must be made under the Fifth Amendment of the Constitution . . . ."

The opinion pointed out that the

> ". . . title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and . . . is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers."

The Court said Congress had determined in the 1909 statute that the whole flow of the stream should be devoted exclusively to the purposes of navigation. So unfettered is the control of Congress over navigable streams, said the Court, that its determination of the necessity of utilizing the entire flow for navigation is conclusive. There is no room, it was said, for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation.

While the Chandler-Dunbar riparian water rights, acquired under the law of Michigan, were valuable property rights, they were *ab initio* subordinate and inferior to the paramount power of the United States to take all the river's flow for the purposes of commerce. When Congress exercised that power, it extinguished the

Chandler-Dunbar rights, because after that taking there remained no portion of the flow with respect to which those previously existing rights could be effective. So the Court held the riparian owner had to yield without compensation its rights which had always been inferior.

Since the *Chandler-Dunbar* ruling was that the statute of 1909 seized all the flow of the St. Marys and that the inferior rights thereby extinguished were not compensable, the case is not authority for the Power Commission's position. It simply demonstrates the obvious proposition that, when the government takes control of all the waters of a navigable stream, there is no room thereafter for previously existing private usufructuary rights. But it is equally true that the water rights of riparian owners, valid under state law, constitute a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority.[3]

So the question becomes whether Congress, by enacting the Federal Water Power Act of 1920, asserted its theretofore unexercised paramount power to declare all the waters of the Niagara essential for purposes of commerce, as the Act of 1909 did with respect to the St. Marys. If the mere passage of the Act amounted to a declaration by Congress that the entire flow of all navigable rivers is essential for use in commerce, then its passage extinguished all previously existing private water rights in all navigable streams, including of course the Niagara, and so destroyed the International Paper and Pettebone-Cataract water rights. Conversely, however, if the Water Power statute did not declare the entire flow of all navigable streams to be necessary for navigation or other purposes of commerce, and consequently did not so declare with respect to the entire flow of the Niagara, the mere passage of the Act did not destroy the two water rights involved in this case. It is therefore necessary to construe the statute and to determine whether it purports to seize for legitimate national purposes all the flow of all navigable rivers, and so whether it had that effect with respect to the Niagara.

Before doing so, however, we think it well to have before us the provisions of a treaty between the United States and Great Britain, proclaimed May 13, 1910, which relates to diversions of water from the Niagara River for power purposes. The pertinent part of Article V of the Treaty is as follows: [4]

> "The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accom-

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[3] *United States v. River Rouge Company*, 269 U. S. 411, 420 (1926).

[4] 36 Stat. 2448, 2450.

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plish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

"So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

"The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

"The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second."

We observe that, in restricting the temporary withdrawal of waters from the Niagara, the only purpose of the High Contracting Parties was to prevent the level of Lake Erie and the flow of the river from being appreciably affected by diversion of the river for power purposes. It was therefore not the intention of the two governments to take away the water rights then existent under state law and then being actually utilized, but simply to keep those rights within the prescribed maximum of 20,000 cfs. And in order to be sure that the Treaty should not be construed as having destroyed existing rights, the Parties wrote into it their desire.

". . . to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York . . . ."

With the terms of the 1910 Treaty in mind, we turn to the Act of 1920 to see whether it purports to destroy the International Paper and Pettebone-Cataract water rights which the Treaty expressly protected. We find in it no declaration that the entire flow of the Niagara or any other navigable river is essential for navigation, and no pre-emption of it for that or any other use in commerce. In that respect the Act differs drastically from the statute of 1909, which was involved in the *Chandler-Dunbar* case. Quite to the contrary of the Congressional purpose declared in the 1909 Act to take the

entire flow of the St. Marys, the Water Power Act by its terms evinces a legislative intention to recognize private water rights held under state law so long as navigation does not require the entire flow. Section 3(11) defines the word "project" as a

> ". . . complete unit of improvement or development, consisting of a powerhouse . . . and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit . . ."

Section 4(b) provides that

> "To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, . . . file with the Commission . . . a statement . . . showing the actual legitimate original cost of construction of such project, . . . and of the price paid for water rights, rights-of-way, lands, or interest in lands."

Section 9(b) requires each applicant for a license to submit to the Commission

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes . . . ."

Section 14 provides that the United States may take over a project upon or after the expiration of the license, upon condition that it pay the net investment of the licensee in the project taken, not to exceed its fair value.

> ". . . Such net investment shall not include or be affected by . . . the license or by good will, going value or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee . . . ."

These references to water rights in the Act seem to us to negative the notion that Congress intended by enacting it to destroy them. More important, however, because it has conclusive effect, is Sec. 27 of the Act which reads as follows:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the

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laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

We have shown that the International Paper and Pettebone-Cataract water rights are vested usufructuary rights acquired under New York law. Being such, they are protected by the terms of Sec. 27, just quoted. This was confirmed by *First Iowa Coop. v. Power Commission*, 328 U. S. 152 (1946), when the Supreme Court said, at page 175:

". . . Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act."

Then, after quoting the text of Sec. 27, the Court went on to say (pages 175-6):

"Section 27 thus evidences the recognition by Congress of the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome. . . .

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. . . ."

The language of Sec. 27 is clear and unequivocal. Reinforced by the authoritative interpretation of the *First Iowa* case, it makes plain beyond peradventure that Congress did not intend the Water Power Act to destroy vested property rights such as those here involved, but only to regulate their exercise.

Moreover, the legislative history of the Act shows that Congress was taking care not to impinge upon the rights of states nor upon their rules of property concerning diversions of water.[5] This Congressional concern was also expressed in the Act. For example, each applicant for a license thereunder is required by Sec. 9(b) to submit to the Commission

"Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks *and to the appropriation, diversion, and use of water for power purposes* . . . ." (Emphasis supplied.)

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[5] *See* remarks of Representative LaFollette, 56 Cong. Rec. 9810 (1917-1918).

The respondent Commission relies upon *Niagara Falls Power Company v. Federal Power Commission*, 137 F. (2d) 787 (1943), as support for its thesis that enactment of the Federal Water Power Act terminated the state-derived International Paper and Pettebone-Cataract rights, and that the federal license of 1921 has been and is the only source of the licensee's right to use Niagara waters. Its brief quotes the following from the opinion in that case:

> "When Congress set up the Commission with power to issue licenses for the 'utilization of power . . . from . . . any of the navigable waters of the United States' (Sec. 4(d) of the Act of June 10, 1920)[6] the Commission was vested with the distribution of this allotment [the Treaty allotment of 20,000 cfs to the United States] and any rights acquired from the State of New York necessarily yielded to what it might do (p. 790-1)."

The question before the Second Circuit in the cited case was whether the licensee's property should be carried on its books at original cost, or at fair value as of the date of its license under the Federal Power Act. A divided court held original cost should be used, with one judge dissenting from the "view that the words 'original cost' are to be limited to cost to the first investor in the power project."

The question before the Second Circuit was quite different from that before us. We are not concerned with the capitalization of assets, but with operating expense. Payments made by Niagara Mohawk for use of the Pettebone-Cataract and International Paper water rights are not elements which enter directly into determination of "net investment" under either the recapture or the ratemaking provisions of the Act, but are purely matters of operating expense. They enter into the amortization reserve only because they reduce net earnings and so reduce the "surplus earned," one-half of which must be passed to such reserve. That the items of expense which have been disallowed arose in good faith from arms-length negotiations is not denied; and that they have in fact been paid—in money or in furnishing electric energy—is not disputed. The payments should not have been disallowed unless the rights for which they were paid had been terminated by the Water Power Act so that the licensee derived such rights only from its federal license. We have already held the Water Power Act did not have that effect.

The language quoted above from the Second Circuit's opinion, which does not seem to have been necessary to decision, apparently assumes that the Treaty had the effect of destroying all diversionary rights under New York law and making the United States the fountainhead of any subsequent private right to use the allotted

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[6] Relettered 4(e) in the present Act.

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20,000 cfs, with the result that the later established Commission could distribute the permitted quantity in disregard of established installations using water under New York authority but within the Treaty's limitation.

This is squarely contrary to the intention the two governments expressed in the Treaty. Congress had absolute power to stop Niagara Falls Power Company from taking any water whatever, as the Second Circuit said. But, as we have shown, it has never exercised that power, and the only term it has imposed is that a federal license be obtained. Such a license is a certificate that the exercise of the water rights therein described—rights which are valid under State law—does not interfere with navigation nor with any other use in commerce to which the flow of the stream might be put. In our view, rights acquired from the State of New York necessarily yielded to what the Commission may do only when the regulatory actions of the State and national governments conflict, as in the *First Iowa* case. For the reasons given we do not regard the cited case as persuasive here.

The licensing provisions of the Act also show, we think, that the measure was not an exercise of the undoubted right of Congress to destroy water rights valid under state law. By authorizing the Commission to issue licenses to use navigable water for power purposes, the statute negates the idea that it declares all such water necessary for use in commerce. Implicit, therefore, in the issuance of a license to Niagara Falls Power Company was a determination by the Federal Power Commission, pursuant to the policy of the Act, that the entire flow of the Niagara was not required for navigation or any other use in interstate commerce.

Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case.[7] And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the *First Iowa* case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert

[7] *United States v. Appalachian Electric Power Company*, 311 U. S. 377 (1940).

the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him.

The Power Commission says in the course of its argument, "Neither Buffalo Niagara nor its predecessors in interest, nor International Paper Company own any lands riparian to the Niagara River to which the alleged water rights are claimed to be appurtenant." It also states that neither Buffalo Niagara nor International Paper has a license, with respect to the rights, from either the Federal Power Commission or the New York Water Power and Control Commission.

The statement that neither Buffalo Niagara nor its predecessors in interest own any riparian land to which the Pettebone-Cataract water rights are appurtenant is incorrect. The Niagara Falls Hydraulic Power and Manufacturing Company owned such riparian land and, by valid grant to the Pettebone-Cataract companies, severed from the land the right to take 262.6 cfs under a partial hand, reserving the right to utilize that water under the remaining head. The Pettebone-Cataract rights passed to Niagara Lockport, which was succeeded by Buffalo Niagara. It is thus seen that Buffalo Niagara's predecessor in interest owned riparian land. The right to 262.6 cfs, though severed, continued to be in the nature of a riparian right. Such a corporeal hereditament is a property right which may be conveyed apart from the land to which it is incident.[8] The water rights of International Paper had a similar origin.

Nor is it necessary to the validity of the two sets of usufructuary property rights that Buffalo Niagara and International Paper have either state or federal licenses. Such authority must be held by him who exercises the rights. Niagara Mohawk, which is the user, holds a federal license therefor and, as we have shown, is not required to have a State license because it pays rent to the State of New York for the water utilized.

We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; that the Treaty of 1910 did not destroy them but preserved their integrity; that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law; that the payments made by the petitioner under its contractual obligations as lessee of the water rights are proper operating expenses.

It follows that the Federal Power Commission erred in disallowing the payments in question and in increasing on that account the

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[8] *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N. Y. 38, 46, 123 N. E. 200, 203 (1919).

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petitioner's amortization reserve liability. The case will be remanded to the Commission with instructions to modify its order of September 27, 1950, in accordance with the views herein expressed.

Remanded for modification of order.

BAZELON, *Circuit Judge*, dissenting:

Petitioner is required by § 10(d) of the Federal Power Act [1] to maintain a surplus amortization reserve account, a percentage of which is applied to reduce the amount of its net investment. Such net investment provides the basis for the Government's liability in the event it exercises its option to take over petitioner's licensed project under the recapture provisions of § 14. [2] In computing this reserve account, petitioner, in effect, diminished it by the amount of certain charges made by others for use of their state created private water rights. Because the Commission viewed such charges as unallowable in computing the Government's liability, it ordered petitioner to increase the required reserves by the amount of such charges. It is that order we review.

All private riparian rights acquired under state law to the use of water in a navigable stream are subject to the preemptive rights of the State and of the United States. [3] And whenever the United States asserts its paramount preemptive right in the exercise of its

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[1] 41 STAT. 1069 (1920), as amended, 49 STAT. 843 (1935), 16 U.S.C. § 803 (d) (1946): "That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license."

[2] Section 14 provides in pertinent part: "Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall *the values allowed for water rights*, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee." 41 Stat. 1071 (1920), as amended, 49 Stat. 844-5 (1935), 16 U.S.C. § 807 (1946) (emphasis supplied).

[3] United States v. Chandler-Dunbar Co., 229 U. S. 53, 62-5, 69 (1913); Long Sault Development Co. v. Kennedy, 212 N. Y. 1, 105 N. E. 849, 852 (1914), *writ dismissed*, 242 U. S. 272, 280 (1916).

power to regulate commerce, "[i]t is liable to no one for its use or non-use,"[4] except to the extent and in the manner Congress "expressly" saves private rights.[5] I dissent here because in my view the Federal Power Act does assert the preemptive right of the United States in the exercise of its power to regulate commerce and does not save the private rights in question.

In *United States* v. *Appalachian Power Co.*, the Supreme Court held that the Federal Power Act was an assertion of United States rights under the commerce power.[6] The impact of this view upon the relationship between state and federal law was amplified in *First Iowa Coop.* v. *Federal Power Comm'n.*[7] The Court there pointed out that "in those fields where rights are not * * * 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."[8] In a later case, *Grand River Dam Authority* v. *Grand Hydro*, the Court refused to apply the principle of supersedure because "the United States or its licensee, as such," was not a party.[9] I read these cases as formulating this rule: At least as applied to the United

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[4] United States v. Appalachian Power Co., 311 U. S. 377, 424 (1940).

[5] First Iowa Coop. v. Federal Power Comm'n, 328 U. S. 152, 175 (1946).

[6] 311 U. S. 377, 424 (1940). The Supreme Court specifically found that § § 10(d) and 14 of the Act, *inter alia*, "have an obvious relationship to the exercise of commerce power." *Id.* at 420, 427. And it expunged the argument that the touchstone of commerce control lies in as restricted a concept of navigation as "no more than operation of boats and improvement of the waterway itself." *Id.* at 426. It plainly enunciated a broader concept: "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." *Ibid.* Thus, the Court concluded that because "the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable." *Ibid.*

For present purposes we need not ponder whether United States rights under the commerce power were first asserted by the enactment of the Rivers and Harbors Act of 1899, 30 Stat. 1151; or the Burton Act of 1906, 34 Stat. 626; or the series of enactments which preceded the Federal Power Act.

[7] 328 U. S. 152, (1946).

[8] *Id.* at 176; *and see* Niagara Falls Power Co. v. Federal Power Comm'n, 137 F. 2d 787, 790 (2d Cir. 1943). But *cf.* Schwartz v. Texas, 21 U. S. L. Week 4055, 4056 (Dec. 15, 1952), and cases cited therein.

[9] 335 U. S. 359, 373 (1948).

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States or its licensee as such, the Federal Power Act is an assertion of the commerce power which constitutes a taking by the United States without compensation of all water rights affecting navigable streams except to the extent and in the manner that the Act expressly saves certain rights created under state law.

Applying this rule to the present case, no charge for state created water rights would be allowed against the United States unless the Act expressly saves these rights. It is said that such rights are saved by § 14 because it provides that "the values allowed for water rights" in determining the licensee's net investment for purposes of recapture by the United States shall not "be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee." [10] But this section does not save any water rights

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[10] See note 2, *supra*. Other sections of the Act are said to indicate an intention to save the water rights involved here. But none are saving clauses:

Section 3 defines the meaning to be given certain words for purposes of the Act. Subsection (11) merely defines "project" to include water rights.

Section 4 (b) only authorizes the Commission to obtain certain information, including "the price paid for water rights," to aid in determining "the actual legitimate original cost of and the net investment in a licensed project." It does not purport to fix either the method or items for such a determination. The purely information-gathering character of this provision is strikingly similar to that of *§ 9 (b)* and is in no sense a recognition of any rights.

Section 9 (b), as construed by the Supreme Court in First Iowa Coop. v. Federal Power Comm'n, 328 U. S. 152 (1946), is not a saving clause:

> "Section 9(b) does not resemble § 27. It must be read with § 9(a) and (c). The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. * * * § 9 (b) calls for legal information. This makes § 9(b) a natural place in which to describe the evidence which the Commission shall require in order to pass upon applications for federal licenses. This makes it a correspondingly unnatural place to establish by implication such a substantive policy as that contained in § 27 * * *." *Id.* at 177.
>
> "* * * The directness and clarity of § 27 as a 'saving' clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9(b)* * *. In view of the use by Congress of such an adequate 'saving' clause in § 27, its failure to use similar language in § 9(b) is persuasive

from supersedure. It merely provides a standard of compensation for rights saved. It is only § 27 which "expressly 'saves' certain state laws relating to property rights as to the use of water *so that these are not superseded by the terms of the Federal Power Act.*" [11] That section provides in pertinent part:

> "That nothing herein * * * shall be construed as affecting * * * the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation* or *for municipal or other uses*, or any vested right acquired therein."[12]

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that § 9(b) should not be given the same effect as is given to § 27." *Id.* at 175.

Section 10(c), making a licensee "liable for all damages occasioned to the property of others" resulting from the construction or operation of the project, significantly provides that "in no event shall the United States be liable therefor." *Cf.* Ford & Son v. Little Falls Co., 280 U. S. 369 (1930).

Section 20 deals with project valuation for rate making purposes and provides, *inter alia*, that "no value shall be claimed or allowed for the rights granted by the Commission or by this Act." Since petitioner's right to the water power in question here is derived from a license issued under the Act, this provision is consistent with rather than contrary to my view.

Section 21 confers the power of condemnation upon a licensee to acquire "an unimproved dam site or the right to use or damage the lands *or property* of others." The absence of any reference to water rights, despite the obvious care for mentioning them throughout the Act, discounts the notion that water rights were intended to be embraced by the words "or property." Instead it suggests congressional awareness that rights in "waterways for the use * * * of interstate or foreign commerce" depend not upon condemnation of private rights by a licensee but only upon a grant by way of license under the Act. And even if water rights were meant to be included, there is nothing to indicate that they are saved for purposes of compensation.

Section 23 provides in effect that net investment shall be allowed at fair value, rather than actual reasonable cost, for projects constructed prior to the Act under permits "heretofore granted." In Niagara Falls Power Co. v. Federal Power Comm'n, 137 F. 2d 787, 790 (2d Cir. 1943), the court held (1) that the permits referred to in this section were indefeasible grants issued by federal authorities and (2) that petitioner did not have such a permit.

[11] 328 U. S. 152, 175 (1946) (emphasis supplied).

[12] 41 Stat. 1077, 16 U. S. C. § 821 (1946) (emphasis supplied).

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"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal *or other uses of the same nature.*" [13] The words " 'other uses' * * * are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." [14] And the phrase "any vested right acquired *therein*" limits the "property rights" saved to those related to such purposes. [15]

Since no claim is made that the proprietary water rights here are related to such purposes, I conclude that they have not been saved from supersedure by the Act. [16] Hence they are not compensable under § 14, and any charges for their use are not deductible in computing the reserves required by § 10 (d). I would, therefore, affirm the Commission's order.

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed December 31, 1952. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1952

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

Petition for Review of Order of the Federal Power Commission.

Before: Kimbrough Stone, Circuit Judge, retired (sitting by designation), and Wilbur K. Miller and Bazelon, Circuit Judges.

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

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[13] 328 U. S. 152, 175-6 (1946) (emphasis supplied).

[14] *Id.* at 176.

[15] *Ibid.* (emphasis supplied). To the extent that this court's decision in Alabama Power Co. v. McNinch, 68 App. D. C. 132, 147, 94 F. 2d 601, 616 (1937), is in conflict with this more recent ruling of the Supreme Court, it cannot be followed here.

[16] If the alleged private water rights are ultimately held to be valid as between the private parties, it "is the price which [petitioner] must pay to secure the right to maintain [its project." Fox River Co. v. Railroad Commission, 274 U. S. 651, 657 (1927), quoted with approval in United States v. Appalachian Power Co., 311 U. S. 377, 427-8 (1940). *And see* Grand River Dam Authority v. Grand Hydro, 335 U. S. 359, 374 (1948).

On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be, and it is hereby, modified so as to conform with the views expressed in the opinion of this Court and that this case be, and it is hereby, remanded to the Federal Power Commission with instructions to modify its order of September 27, 1950, in accordance herewith.

Per Curiam.

Dated: December 31, 1952

Separate dissenting opinion by Circuit Judge Bazelon.

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 11, 1953. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,862

NIAGARA MOHAWK POWER CORPORATION, APPELLANT,

v.

FEDERAL POWER COMMISSION, APPELLEE.

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Supplemental Appendix.
3. Minute entry of argument.
4. Opinion.
5. Judgment.
6. This designation.
7. Clerk's certificate.

ROBERT L. STERN,
Acting Solicitor General.
Counsel for Appellee.

BLEED THROUGH-

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing designation of record has been mailed to each of the following counsel for appellant:

JOHN W. DAVIS,
15 Broad Street
New York 5, New York

RANDALL J. LEBOEUF
c/o LeBoeuf and Lamb
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ROBERT L. STERN,
Acting Solicitor General
Counsel for Appellee

March 11, 1953

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 11, 1953. Joseph W. Stewart, Clerk.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. ——

FEDERAL POWER COMMISSION, PETITIONER,

v.

NIAGARA MOHAWK POWER CORPORATION, RESPONDENT.

STIPULATION

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that, for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix.
(b) Supplemental Appendix.
(c) Minute entry of argument.
(d) Opinion.
(e) Judgment.
(f) Designation of record.
(g) Clerk's certificate.
(h) This stipulation.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Court of Appeals for the District

of Columbia Circuit to transmit the original transcript of record to the Supreme Court of the United States and that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

ROBERT L. STERN,
Acting Solicitor General.
Counsel for Petitioner.
JOHN W. DAVIS,
Counsel for Respondent.

March 19, 1953.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 625, both inclusive, constitute a true copy of the joint and supplemental appendices to the briefs and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellee, in the case of:

NIAGARA MOHAWK POWER CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 10,862 —— January, Term, 1953, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-third day of March, A. D. 1953.

(S.) JOSEPH W. STEWART.

Clerk of the United States Court of Appeals for the District of Columbia Circuit. (Seal)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 249889 1397

BLEED THROUGH-

Supreme Court of the United States

No. 691, October Term, 1952

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

Order allowing certiorari

Filed May 18, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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BLEED THROUGH-

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 691

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit remanding, with instructions to modify, an order of the Commission issued September 27, 1950.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is not yet reported; that of the Commission (R. 105) at 9 F. P. C. 228.

JURISDICTION

The order of the Court of Appeals was entered on December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The respondent, the Niagara Mohawk Power Corporation, a licensee under Part I of the Federal Power Act,[1] paid two other companies for waterpower rights those companies claimed to possess under state law to the use of the water of the navigable Niagara River. The use of such water through the Niagara Falls project by the respondent was expressly authorized under a Federal Power Act license for that project. In computing the amortization reserve of the respondent required by Section 10 (d) of the Act (Appendix, pp. 32–33 *infra*), the Commission disallowed these payments for the waterpower rights. The Court of Appeals reversed, holding that the payments were legitimate project expenses and properly allowable in computing the amortization reserve of Section 10 (d).

[1] 16 U. S. C. 791a *et seq.* The Federal Water Power Act of 1920, as amended, is Part I of the present Federal Power Act.

The license was issued on March 2, 1921, to Niagara Falls Power Company, which merged with the respondent on October 19, 1950. Nothing in the case turns on the merger and, for convenience, "Company" is used to refer to the company holding the license.

BLEED THROUGH-

The questions presented are:

1. Are state laws authorizing waterpower use of a navigable stream and waterpower rights acquired thereunder superseded by the Federal Power Act and a license pursuant thereto granting Federal authority for the use of such stream for waterpower development?

2. Is a party licensed under the Federal Power Act to use the waters of a navigable stream through a hydroelectric project required to compensate another company for taking the latter's waterpower rights acquired under state law for power use of the same water?

3. Are payments by federally licensed companies, with express authorization to use certain waterpower, to owners of the alleged waterpower rights under state law properly allowable as legitimate operating expenses under the Federal Power Act?

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, 16 U. S. C. 791a, *et seq.*), and the River and Harbor Act of 1899 (30 Stat. 1121) are printed in the Appendix (*infra*, pp. 30–41).

STATEMENT

During the last two decades of the nineteenth century, the International Paper Company, certain parties termed the "Pettebone-Cataract interests," and others were granted certain lands and "waterpower rights" on the United States

side of the Niagara River above the Falls by private grant, letters patent from the State of New York and acts of the legislature of that state. These "waterpower rights" were exercised by diverting the water above the Falls, conducting it through an intake canal owned by a predecessor of the licensee Company, dropping it through tunnels for about 100 feet and discharging it from a cliff below the Falls into the River.

After passage of the River and Harbor Act of 1899 (30 Stat. 1121), prohibiting structures in navigable waters and impairment of navigable capacity without War Department permission, a predecessor of the licensee Company applied for and secured such permission in 1900, 1903, 1904, and 1905, respectively, to use the water for power purposes. Upon passage of the Burton Act of June 29, 1906 (34 Stat. 626), specifically prohibiting diversions from the Niagara River without War Department permission, and upon extensions of that Act with a similar requirement, the Company's predecessor secured further War Department permission to make the diversions.[2]

[2] The Burton Act, and extensions thereof approved March 3, 1909, August 22, 1911, April 5, 1912, January 19, 1917, June 30, 1917, June 29, 1918, and July 12, 1919, are printed at R. 416, 437, 452, 453, 457, 461, 465, and 468. The International Boundary Waters Treaty proclaimed May 13, 1910 (36 Stat. 2448, R. 438) permitted a diversion of 20,000 cubic feet per second (cfs) on the United States side. The War Department permits were issued August 16, 1907, September

BLEED THROUGH-

On March 2, 1921, a license authorizing the respondent company to divert water from the Niagara River for use in the development of power through the Niagara Falls plant (FPC Project No. 16),[3] was issued under the Federal Water Power Act. Pursuant to Section 10 (d) of the Act,[4] the license specifies six percent as a reasonable rate of return and provides that one-half of the earnings in excess thereof should, after 20 years of operation, be transferred to the amortization reserves required by that section. The amortization reserve is one of the deductions to be made from the original cost in determining the "net investment" in a project.

On September 27, 1950, in a proceeding pursuant to Section 10 (d) of the Act, the Commission found that the Company had earned $1,828,864.08 in excess of the six percent return from normal project operations for the period

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2, 1911, April 23, 1912, January 19, 1917, July 2, 1917, July 1, 1918, June 30, 1919, and July 30, 1919 (R. 436, 452, 454, 459, 462, 466, 467, and 469). None of these permits allowed a total diversion of more than 15,600 cfs.

[3] This plant develops the full head, 212 feet, instead of the 100 feet formerly developed.

[4] The pertinent part of Section 10 (d) provides:

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment * * *, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. * * *

from March 2, 1941 (20 years after the license was issued) to December 31, 1946. Accordingly, the Commission directed that one-half of this excess ($914,437.04) be placed in an amortization reserve as required by Section 10 (d) and the provisions of the license (R. 115–117). 9 F. P. C. 228. On appeal to the court below, the respondent claimed that the amount to be transferred to the amortization reserve was only $515,432.04. The $399,000 difference between the Commission and the Company represents one-half of $798,000, the amount by which the Commission adjusted the Company's operating expenses for the period involved. The disallowance of $798,000 is made up of two items.

1. Payments of $577,500 made by the Company to International Paper Company under a contract entered into in 1919, as subsequently adjusted in 1937, by which International Paper leased to the Company, at an annual rental of $99,000, its "water-power rights" to use 730 cubic feet per second (cfs) of water for power development which it had enjoyed since the 1890's under State law.[5]

[5] Cf. *International Paper Co.* v. *United States*, 282 U. S. 399. In that case, this Court held that when the Paper Company had an agreement with respondent's predecessor, itself a Federal licensee under the Act of June 29, 1906, 34 Stat. 626 (p. 407), to use certain amounts of water for power purposes, a diversion of that water in 1918 by the Secretary of War from the Power Company (and from the Paper Company) rendered the United States liable in damages to

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2. A concession amounting to $220,500, which the Commission found to result from the reduced electric rates which the Company charged Buffalo Niagara Electric Corporation (the Company's then parent) in exchange for other "waterpower rights" under State law. The Buffalo Niagara "waterpower rights" (derived from the "Pettebone-Cataract" interests) are said to have arisen toward the end of the last century for the use of 262.6 cfs of Niagara River water for power development. In 1925 the Company leased these State waterpower rights from Niagara, Lockport and Ontario Power Company, the then owner under State law, in return for a concession in the rates at which the Company would furnish electric power to Niagara Lockport. In 1945 Niagara Lockport was consolidated with another company to create Buffalo Niagara.

This refusal of the Commisison to recognize any charges by other parties for the use by the licensee Company of their State-created "waterpower rights" was held by the majority of the

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the Paper Company. As the Court held (p. 407), the Secretary of War made no attempt to revoke the license of the Power Company, and proceeded "on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish."

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court below (Kimbrough Stone, Miller, JJ.) to be improper.[6]

The basic principle underlying the decision of the lower court appears in connection with its distinction between a claim to ownership of running waters (which it said was not asserted here), and the right to use such waters temporarily, a usufructuary right long recognized. The court said (R. 607–608) that the Federal Power Act:

> is a purely regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case [*United States* v. *Appalachian Power Company*, 311 U. S. 377 (1949)]. * * * But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the

[6] In 1947, the Commission denied a proposed amendment to the charter of the Company, which would have had the effect of recognizing the validity of the water rights of the Pettebone-Cataract interests and of the International Paper Company. *In the Matter of The Niagara Falls Power Company*, 6 F. P. C. 784 (R. 387). See also *Niagara Falls Power Company* v. *Federal Power Commission*, 137 F. 2d 787, 791, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

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> water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him.

The court further concluded that an analysis of the statutory provisions of the Federal Power Act showed that Congress intended by that Act to give full weight to state ownership of waterpower rights in navigable waters as recognized by state law. Accordingly, since the lower court was of the view that these "waterpower rights" were valid usufructuary property rights under New York State law, it held that the payments of the Company pursuant to its contractual obligations should be allowed as project operating expenses.

Judge Bazelon dissented. He considered this Court's opinion in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, controlling. He read that opinion as holding that the Power Act stated a Congressional assertion of the dominant Federal authority over navigable waters. Hence by that Act Congress superseded all water rights affecting navigable waters except those expressly saved. Nothing in the Act, according to Judge Bazelon, operated to save the "waterpower rights" of the type here involved.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that Congress has not by the Federal Power Act and its predecessor statutes as-

serted its dominant authority over navigable waters of the United States insofar as concerns water-power development.

2. In holding that state laws authorizing water-power use of navigable streams and waterpower rights acquired thereunder are not superseded by the Federal Power Act and a license thereunder.

3. In holding that a Federal Power Act licensee, licensed to use the waters of a navigable stream through the project covered by the license, is also required to comply with state laws relating to the power use of such waters, and that the licensee is required to compensate other parties for taking their waterpower rights under state law, if the licensee uses the water covered by such state rights for power development under the license.

4. In holding that payments by the respondent company to others for their state waterpower rights were legitimate operating expenses for the purpose of computing the respondent's amortization reserve under Section 10 (d) of the Act.

REASONS FOR GRANTING THE WRIT

The court below has decided a basic and important question in the administration of the Federal Power Act—a question expressly left open by this Court in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373—in a manner which is inconsistent with the interpretation of

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the Act in prior decisions of this Court and which is in subtantial conflict with the reasoning of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commn.*, 137 F. 2d 787, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

1. (a) The narrow question in this case is whether, in computing the amortization reserve of a licensee under part I of the Federal Power Act, the Commission is forced to recognize, as valid operating expenses, payments made by the licensee for the use of waterpower rights which are allegedly owned by others under state law. Under Section 10 (d) of the Act, after 20 years of operation, one-half of the earnings of a licensee in excess of a reasonable return are to be transferred to the amortization reserve. This amortization reserve then serves to decrease the amount of the net investment of the licensee.

The net investment of a licensee is important in the administration of the Act for the following reasons:

(1) It determines the cost to the United States of the acquisition of the project under Section 14 of the Act (Appendix, pp. 33–34, *infra*), should the United States decide to take over the project at the end of the license period.

(2) It serves as the basis for the rental which the United States must pay for a project which is taken temporarily during

periods of national emergency. Sec. 16 (Appendix, pp. 34–35, *infra*).

(3) It serves as the basis for the price the United States shall pay for the project upon a court sale pursuant to Section 26 of the Act (Appendix, pp. 38–39, *infra*).

(4) It serves as the basis for the fixing by the Commission of reasonable rates to be charged by the licensee. Secs. 19 and 20 (Appendix, pp. 35–38, *infra*).

The questions presented by this Act will arise in every case where licensees treat as legitimate operating expenses payments made for waterpower rights claimed under state law. Further, if payments for state-conferred "waterpower rights" are legitimate project expenses, the principles applied by the court below would require the Commission to allow them as legitimate project costs under Section 4 (b) (Appendix, p. 31, *infra*) when made for outright purchase of such "rights." It is not possible at this time to say in how many instances similar payments, either as annual rental payments for the use of state-conferred waterpower rights or as outright purchases of such rights, are claimed as either project operating expenses or as project capital costs. However, the claims to such payments already submitted by licensees run into several millions of dollars and relate to a sizeable number of licensed projects. The increase in net investment in this case alone will amount to $399,000, plus the additional sums which must

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be allowed, if the judgment of the court below is not disturbed, in the years from 1946 until the end of the license on March 1, 1971.

(b) The broad question in this case goes to the basic theory of the Act. It presents the issue as to the extent to which the Federal Power Act has superseded state law. Under the decision below, an applicant for a Federal Power Act license to construct a waterpower project in a navigable stream must also pay for "rights" recognized by state law in order to use the water of the stream for power purposes. The decision of the court below is thus of importance to every licensee, which, in reliance upon the Federal Power Act authority and license, may have failed to meet the conditions imposed by the alleged possessors of state rights for the use of the power, to every prospective applicant for a license, to the consumer of power whose rates are based upon the licensee's operating costs, and to the United States, if and when it takes over or leases the project. Cf. *First Iowa Coop.* v. *Federal Power Commn.*, 328 U. S. 152.

2. The waterpower rights for which the payments in question were made were "owned" by private parties, who are not authorized or licensed under the Federal Power Act to possess such rights. The only basis for those rights claimed by these parties is that they are recognized under state law. This has the effect of requiring the United States to pay, at the termination of the

license period or during a temporary seizure, for waterpower rights—that is, the right to use the water in a navigable stream for power purposes—claimed by private parties. This result is completely at odds with the decisions of this Court which recognized as early as 1913 that the Federal Government has complete dominion over the waterpower of navigable streams. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; see also *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88. If there ever was any doubt as to the exclusive proprietary interest of the United States in a navigable stream (cf. *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369), that doubt was resolved by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, when it stated (pp. 424, 427):

> * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or nonuse. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable."
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> * * * * *
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> * * * It has been shown * * * that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined,

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> for the fast land; nothing for the water-power.

See also *New Jersey* v. *Sargent,* 269 U. S. 328, 337; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596–597; *United States* v. *Commodore Park,* 324 U. S. 386, 390; *United States* v. *Willow River Power Co.,* 324 U. S. 499; *United States ex rel. Chapman* v. *Federal Power Commn.,* Nos. 28 and 29, this Term, decided March 16, 1953, slip opinion, pp. 16–17, dissent, pp. 1–2.

Despite these clear expressions that the complete ownership of the flow of a navigable stream is in the United States, the effect of the decision below is that in the Federal Power Act Congress intended to obligate the United States to pay for such state vested waterpower rights upon acquisition or rental of the project and to obligate the consumers of electric power to pay for such rights in their rates.

The court below held that in the Federal Water Power Act of 1920 Congress had not asserted its paramount authority over the navigable waters of the nation to the same extent as it had in the Act of March 3, 1909 (35 Stat. 815, 820). It attempted to distinguish *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, where, in a condemnation proceeding instituted by the United States under the Act of 1909, this Court held that that Act had extinguished all inferior rights

in the St. Marys River. Accordingly, the United States did not have to pay for the "flow of the stream." As this Court stated, "that the running water in a great navigable stream is capable of private ownership is inconceivable" (229 U. S. at 66, 69). The only relevant distinction between *Chandler-Dunbar* and this case is the fact that the two cases arose under different statutes. Yet nothing in the Federal Power Act indicates that the private power rights in navigable waters were to be recognized by the Commission or the United states to any greater extent than were the rights involved in *Chandler-Dunbar.*[7]

[7] The Federal Water Power Act of 1920 may be traced at least as far back as President Theodore Roosevelt's veto of the Rainy River bill, 1908, decrying the policy of "giving away the property of the people in the flowing waters" (42 Cong. Rec. 4698). The River and Harbor Act of 1890 (26 Stat. 426, 454) required either federal or state authorization, in appropriate circumstances, for obstruction to navigable streams. Sections 9 and 10 of the River and Harbor Act of 1899 (30 Stat. 1121, 1151) (Appendix, *infra*, pp. 40–41) made it unlawful to construct certain structures in navigable streams without the consent of Congress and War Department approval, and prohibited, without express Federal authorization, any obstruction to the navigable capacity of any of the navigable waters of the United States. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424.

The Burton Act of June 29, 1906 (34 Stat. 626) expressly made any Federal permits for the use of the waters of the Niagara River for power development revocable at will, and fixed a final termination date for those permits, as did all extensions of the Act. *Sanitary District* v. *United States*, 266 U. S. 405, 431. See also 54 Cong. Rec. 704, 55 Cong. Rec. 4541.

During the consideration of the Federal Water Power Act, an amendment was offered to the bill to exclude the Niagara

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Both the majority and dissenting judges of the court below recognized (R. 604–605, 612–613) that the crucial section on the issue of interpretation of the Federal Power Act was Section 27, *infra*, pp. 39–40, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in *irrigation or for municipal or other* uses, or any vested right acquired therein. [Emphasis added.]

Clearly the use of water for power purposes is not an "irrigation" or "municipal" use. These are consumptive water uses and would also include rights to water for domestic purposes and for stock watering, the type of uses which generally and more especially in the arid West are vital to the preservation of life and the maintenance of the economy of the area. On the other

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River from its coverage (59 Cong. Rec. 1483–1484, 1487–1494). Chairman Wadsworth, in charge of the bill for the Commerce Committee, opposed the amendment and assured the Senate (*id.* at 1485–1486) that "the company now operating at Niagara Falls will fall completely under the jurisdiction of the commission just as any other water-power company anywhere in the United States falls under it."

The International Boundary Waters Treaty of 1910 (36 Stat. 2448, 2450), relied upon by the court below (R. 602–603) was, of course, an agreement between the United States and Canada and did not relate to the question as to whether federal or state laws should control the diversions allowed in the United States. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, *supra*, at 790.

hand, the use of water for power purposes is obviously not a consumptive use and state laws for its control are not protected against supersedure by Section 27 of the Power Act, at least insofar as navigable waters of the type here involved are concerned. As this Court held in *First Iowa Coop.* v. *Power Commission,* 328 U. S. 152, 175–176:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature.* It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." *Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.* This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal.'" *Alabama Power Co.* v. *Gulf Power Co.,* 283 F. 606, 619. [Emphasis added.]

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The issue in the *First Iowa* case was whether requirements imposed by Iowa law were necessary prerequisites to the granting of a license by the Federal Power Commission. This Court held, consistently with the expression quoted above, that the Federal Act superseded state law and that the secururing of a state permit was not a condition precedent to the securing of a federal license.[8] It thus appears that the decision of the court below (R. 607–608)—that "an applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him"—is inconsistent with the decision of this Court in *First Iowa*.[9] For, as this Court stated, "The

[8] In proceedings subsequent to the decision of this Court, the Commission issued a license without any showing that the applicant had complied with state laws for waterpower use of the navigable Cedar River, notwithstanding a prohibition in the state law against the diversion proposed. The validity of this license was affirmed by the Court of Appeals for the Eighth Circuit, *State of Iowa* v. *Federal Power Commn.*, 178 F. 2d 421, certiorari denied, 339 U. S. 979.

[9] In referring to the regulatory nature of the Power Act, the lower court distinguished between a claim to the ownership of running waters (which it says is not asserted here) and a claim to usufructuary rights in flowing waters long recognized as incident to riparian land ownership (R. 594). On the other hand, no such distinction was considered relevant by this Court in denying compensation to the Chandler-Dunbar Company for alleged "waterpower rights" acquired under State law or for additional value to uplands strategically located for waterpower development, *United States* v.

detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." 328 U. S., at 181.

The court below attempted to support its conclusion by reference to the language of certain other sections of the Act. None of these sections, however, furnishes substantial support for its result. Section 9 (b) (Appendix, *infra*, p. 32) provides that an applicant for a license must submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *." But this section recognizes no waterpower rights under State law. It does not "establish by implication such a substantive policy as that contained in § 27 * * *." It is merely a description of "the evidence which the

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Chandler-Dunbar Co., 229 U. S. 53, 69, 76. The fundamental objection to compensation for loss of such state-conferred "waterpower rights" in the construction of a Federal improvement was there expressed by the Court:

"* * * The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."

See also *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88. These two decisions make it clear that the commerce power of the United States, when asserted, is not to be burdened by payment for claims under state law to either the waterpower of navigable streams or to usufructuary rights in such waters.

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Commission shall require in order to pass upon applications for federal licenses." *First Iowa Coop.* v. *Power Commn.,* 328 U. S. at 177. Section 3 (11) (Appendix, *infra,* p. 30) defines "project" as including "all miscellaneous structures * * *, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." Section 4 (b) provides that "to determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall * * * file with the Commission * * * a statement * * * showing * * * the price paid for water rights, rights-of-way, lands, or interest in lands. * * *" As Judge Bazelon pointed out (R. 611), neither Section 3 (11) nor 4 (b) recognizes any State water rights. Section 3 is merely a definition of the word, "project" without substantive implications, and Section 4 (b) is "strikingly similar to * * * § 9 (b) and is in no sense a recognition of any rights."

Indeed, Section 14 of the Act expressly provides that when the United States takes over a project at the end of a license period, the net investment, which is the basis for the compensation due the licensee, "shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed

by the Commission under this Act, by the license or by good will, going value, or prospective revenues."[10] And in *United States* v. *Appalachian Power Co.* this Court stated (pp. 427–428):

> It has been shown * * * that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In our view this "is the price which [respondents] must pay to secure the right to maintain their dam."

But the result of the decision below will be to require the United States to pay, at the expiration of this period, for water rights which have not been saved by the Act.

In the words of this Court (*First Iowa Coop.* v. *Power Commn.*, 328 U. S. at 180), the Act

> * * * was the outgrowth of a widely supported effort of the conservationists to

[10] The remainder of this clause of the section provides: "nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee." This reference to "water rights" obviously is directed toward those rights saved by Section 27. See *supra*, pp. 17–20.

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> secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It would require clear and unequivocal language in the statute to warrant holding that water rights used for power purposes were among the rights saved by the Act. Such an expression does not appear. Indeed, the effect of the decision below is inconsistent with those sections.

3. The decision below is in substantial conflict with the reasoning of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Power Comm'n,* 137 F. 2d 787, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.[11] In

[11] The lower court's decision in the instant case is in harmony with its decision in 1937 in *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601, and its subsequent opinion in the same case in *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, certiorari denied, 317 U. S. 652. However, both these cases were decided before this Court's opinion in the *First Iowa* case, and the opinion of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* Indeed, in the *Alabama Power Company* cases the Commission took a position which was inconsistent with the position taken in regard to the state waterpower rights here involved.

that case the question was whether the property of the licensee (the Niagara Falls Power Company, the immediate predecessor of the respondent) should be valued at fair value under Section 23 (a) (Appendix, *infra,* p. 38) or at net investment, as defined in Section 3 (13) for the purposes of the rate base and the costs of acquisition to the United States. This question in turn depended upon whether the license involved was "for a project * * * already constructed" under a "permit * * * heretofore granted" within the meaning of the Section 23 (a), in which case the licensee could use fair value, which was presumably higher. The company urged, *inter alia,* that Section 23 (a) referred to a state permit or authorization. But the court held that the section referred only to a federal permit. It stated (per Learned Hand, J.) (pp. 790–791):

> * * * When Congress passed the Federal Water Power Act in 1920 * * *, the petitioner's slate was wiped clean; it stood at discretion, so far as concerned any existing federal rights of diversion. Congress had absolute power to stop it from taking any water whatever, or to impose what terms it chose * * *. When Congress set up the Commission with power to issue licenses for the "utilization of power * * * from * * * any of the navigable waters of the United States" * * *the Commission was vested with the distribution of its allotment, and any rights acquired from the

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> State of New York necessarily yielded to what it might do. * * *

The fact that the Second Circuit was dealing with the capitalization of assets and not, as here, with operating expenses, does not, as the court below seemed to think (R. 606), distinguish the two cases. For the principle underlying the two decisions—the effect of the Federal Power Act upon state water rights—is the same, and the practical effect, increasing the cost to the United States of the project upon recapture at the close of the license period or during emergency periods, is directly affected by both capitalization and operating expenses. *Niagara Falls Power Co.* stands for the proposition that state waterpower rights need not be recognized for the purposes of the Federal Power Act. On the other hand, the court below held that the Act did not affect such rights. This basic difference in analysis of the Act and the difference in treatment of the same company, depending upon its choice of circuit for review, present a conflict which requires resolution by this Court.

4. The court below failed to appreciate the difference between the relationship of the Federal authority *vis-a-vis* the licensee on the one hand, and the licensee *vis-a-vis* private parties, on the other. This distinction was clearly pointed out by this Court in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359. There the courts of Oklahoma had allowed power-site value for

the dam site of a project, even though the development had been built under a Federal Power Act license. Though holding that such evidence of power-site value was relevant to the question of compensation due the owner for its land, the Court said (pp. 373):

> If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land. The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act.

The Court then went on to state (pp. 374–375) that the question as to the effect of the provisions of the Federal Power Act concerning the rate base of the licensee and the acquisition price were not before it and that no opinion was expressed on those issues. On the other hand, the dissenting opinion clearly reached the issue and asserted its belief that the Act had wiped out any

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waterpower value to a private party, who, by reason of Federal law, neither had nor could acquire any lawful claim to it (*id.* at 375–376).

The effect of the majority opinion in *Grand River Dam* is to draw a distinction between the requirements the Federal authority may place upon the licensee and the relationship between the licensee and third parties. Thus, even if it is assumed (contrary to our contentions) that the Federal Power Act did not wipe out State waterpower rights as between private parties, it does not follow that the Act did not wipe out those rights as between the licensee and the United States and its regulatory agency. In *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, the Federal Communications Commission had required the breach of a contract between the licensee and a third party as a condition of the Federal license. The third party brought a successful suit for damages in the State court over the contention of the licensee that the requirement of the Commission was superior to any private contract. This Court affirmed the judgment for the third party, holding that the question of the rights between the licensee and the third party did not affect the licensing power of the Federal Communications Commission.[12]

[12] This distinction between rights of third parties and licensees, on the one hand, and rights of the licensee and the Commission, on the other, makes any reliance by the respondent upon cases such as *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, misplaced.

In this case it may be that the disallowance of the payments by the respondent to the Buffalo Niagara Power Company and the International Paper Company will lead the respondent to refuse to recognize its contract with those companies, resulting in suits for damages by those companies against the respondent. It is our contention that such a suit should not prevail, inasmuch as the Federal Power Act has wiped out the state waterpower rights claimed by the Buffalo Niagara and International Paper. Even if this contention is not sustained, the fact that respondent may be liable in damages for breach of the contract, does not, under *Regents* v. *Carroll,* affect the power of the Commission to disallow the payments as a condition of the license it has granted to the respondent.

The scheme of the Act places the Federal Power Commission and the United States in a completely different position from that enjoyed by the private parties in the *Grand River Dam* case. The United States is concededly the ultimate owner of all water rights in navigable streams. The question the majority in the *Grand River Dam* case did not reach is the question presented by this case: the effect of state waterpower rights upon the federal regulatory agency and the United States. It is our position that, in finding those rights binding upon the Commission directly, and the United States somewhat more indirectly (see pp. 13–14, *supra*), the

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court below failed to follow the principles set forth by this Court in the *Chandler-Dunbar, Appalachian Power* and *First Iowa Coop.* cases (all *supra*). In any event, we believe the questions presented are ones which this Court should decided at this time. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 421.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MARCH 1953

APPENDIX

FEDERAL POWER ACT

The following sections are taken from the Federal Power Act, as amended August 26, 1935. The Act was originally approved June 10, 1920 (41 Stat. 1063) and amended August 26, 1935 (49 Stat. 838), insofar as pertinent here, 16 U. S. C. 791a–825r.

> Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;
>
> * * * * *

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Sec. 4. The Commission is hereby authorized and empowered—

* * * * *

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works neces-

sary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

* * * * *

Sec. 9. That each applicant for a license hereunder shall submit to the commission—

* * * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this Act.

* * * * *

Sec. 10. All licenses issued under this Part shall be on the following conditions:

* * * * *

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the

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net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

* * * * *

Sec. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the

Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

* * * * *

Sec. 16. That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party

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or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the Commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

* * * * *

Sec. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of

said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or

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character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any evaluation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be

claimed or allowed for the rights granted by the commission or by this Act.

* * * * *

Sec. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

* * * * *

Sec. 26. That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any

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permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the abovementioned proceedings and shall have power to issue and execute all necessary process and to make and enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license.

Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere

with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

RIVER AND HARBOR ACT APPROVED MARCH 3, 1899

30 Stat. 1121, 1151

* * * * *

Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

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Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 585–613) is reported at 202 F. 2d 190. The Commission's opinion and order (R. 105–117) is reported at 9 F. P. C. 228.

JURISDICTION

The judgment of the Court of Appeals (R. 613–614) was entered on December 31, 1952. The petition for certiorari was filed March 30, 1953, and was granted on May 18, 1953 (R. 617). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The respondent, the Niagara Mohawk Power Corporation, a licensee under Part I of the Federal Power Act,[1] paid two other companies for water power rights those companies claimed to possess under state law to the use of the water of the navigable Niagara River. The use of such water through the Niagara Falls project by the respondent was expressly authorized under a Federal Power Act license for that project. In computing the amortization reserve of the respondent required by Section 10 (d) of the Act, the Commission disallowed these payments for the water power rights. The Court of Appeals reversed, holding that the payments were legitimate project expenses and properly allowable in computing the amortization reserve of Section 10 (d).

The questions presented are:

1. Are state laws authorizing water power use of a navigable stream and water power rights acquired thereunder superseded by the Federal Power Act and a license pursuant thereto granting federal authority for the use of such stream for water power development?

2. Is a party licensed under the Federal Power Act to use the waters of a navigable stream through a hydroelectric project required to com-

[1] 16 U. S. C. 791a *et seq.* The Federal Water Power Act of 1920, as amended, is Part I of the present Federal Power Act.

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pensate another company for taking the latter's water power rights acquired under state law for power use of the same water?

3. Are payments by federally licensed companies, with express authorization to use certain water power, to owners of the alleged water power rights under state law, properly allowable as legitimate operating expenses under the Federal Power Act?

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, 16 U. S. C. 791a, *et seq.*), and of the River and Harbor Act of 1899 (30 Stat. 1121, 33 U. S. C. 401, 403) are included in the Statutory Appendix ("Stat. App."), which is being filed with this brief.

STATEMENT

On March 2, 1921, the Federal Power Commission issued a license to Niagara Falls Power Company ("licensee")[2] under Part I of the Federal Power Act for a water power project along the Niagara River on the New York side of the international boundary at Niagara Falls, designated as Project No. 16. The license for Project No. 16 authorized licensee to divert water from the Ni-

[2] The license was issued on March 2, 1921, to Niagara Falls Power Company, which merged with the respondent on October 19, 1950. Nothing in the case turns on the merger and, for convenience, "licensee" is used to refer to the company holding the license.

agara River at the rate of 19,500 c. f. s.[3] around the Falls for water power development (R. 382). Pursuant to Section 10 (d) of the Act (Stat. App. 11, 12), the license specified six percent as a reasonable rate of return and provided that one-half of the earnings in excess thereof should, after twenty years of operation, be transferred to the amortization reserve required by that Section.

In proceedings brought to determine such excess income, the Commission, in its order of September 25, 1950, found that during the period March 2, 1941, through December 31, 1946, the licensee had unlawfully increased its Project operating expenses by annual payments of $99,000, totalling $577,500 during the five-year period, to International Paper Company for the use of water rights claimed by International Paper under state law. The Commission also found that during this period licensee had unlawfully reduced its annual revenue by making rebates or credits on electric energy sold first to its affiliate, Niagara Lockport and Ontario Power Company, and subsequently to its parent, Buffalo Niagara Electric Corporation, which at the rate of other energy sold to those companies amounted to $37,800 per year or $220,500 during the five-year period. These credits to its affiliate and to its parent were said to be made by licensee in payment for the use of water rights claimed under

[3] Subsequently increased to 20,000 c. f. s.

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state law. The Commission disallowed payments and credits made by the licensee during the period March 2, 1941, through December 31, 1946, for the use of the alleged water rights, in a total amount of $798,000 and ordered that $399,000, which represents one-half of this disallowance, be included in the amortization reserve account.

The alleged state water rights which form the basis of the payments here involved stem from a series of water power grants from the State of New York to the corporate predecessors of licensee,[4] made in 1892 and 1893 to Niagara Falls Power Co.[5] and in 1896 to Niagara Falls Hydraulic Power and Manufacturing Co.[6] See *Niagara Falls Power Co.* v. *Water Power & Control Comm.*, 267 N. Y. 265, 272.

(a) *International Paper Water Rights.*—As a result of a series of leases and conveyances and option agreements entered into between Niagara Falls Power Co. and International Paper Company (or its predecessor the Soo Paper Company) the paper companies were permitted to use 730

[4] Niagara Falls Power Company, which was the licensee during the five-year period here involved, was formed in 1918 by the consolidation of (original) Niagara Falls Power Company, Hydraulic Company of Niagara Falls (originally Niagara Falls Hydraulic Power and Manufacturing Co.), and Cliff Electric Distributing Co. (Laws of New York of 1918, Ch. 596, R. 406).

[5] New York Laws of 1892, Ch. 513, and 1893, Ch. 477 (R. 403–405).

[6] New York Laws of 1896, Ch. 968 (R. 405).

c. f. s. of Niagara Power's water, acquired under temporary and revocable War Department permits and State grants, at a rental of approximately $75,562 per annum (R. 168–209, 220–223). In 1919 International Paper released and "conditionally surrendered" to its grantor the water power rights leased by it in consideration of rate concessions which, in 1937, were converted into flat annual payments of $99,000 (R. 220–247). International Paper never had, nor does it now have, a license from the Federal Power Commission to use such water.

(b) *Pettebone-Cataract Water Rights.*—The second disallowed item of $220,500 goes back to a contract dated January 1, 1900, between Niagara Falls Hydraulic Power and Manufacturing Company and two manufacturing companies, referred to as the Pettebone-Cataract Companies, pursuant to which the latter were given the right to withdraw 262.6 c. f. s. of Niagara Hydraulic's water. In 1925 the Pettebone-Cataract Companies were acquired by Niagara Lockport and Ontario Power Company, an affiliate of Niagara Falls Power Company.[7] By deed dated May 1, 1925, but recorded July 6, 1925 (R. 280, 292), Niagara Lockport conveyed to its affiliate, the licensee, all of the assets of the Pettebone-Cataract Companies, except the rights to the 262.6 c. f. s. of

[7] Niagara Lockport and Niagara Falls Power Company became affiliates on May 11, 1925. Poor, *Public Utilities* (1926) 1150.

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water (R. 283–284). Those Niagara Lockport leased to the licensee in return for the above-mentioned rate concessions. In 1945 Niagara Lockport was merged with Buffalo Niagara, its own parent and also the parent of licensee.

On January 24, 1921, in support of its application pending before the Commission, licensee (then an applicant) stated that it had "the legal proprietary right to the use" of at least the 20,000 c. f. s. of water permitted by the 1910 Treaty with Great Britain and that "no other person or corporation has any lawful authority under the laws of the State of New York or is qualified under the Federal Water Power Act to use or divert such waters for power purposes, or to apply for a preliminary permit or license therefor" (R. 374–375). However, in Article 13 of the license, the Commission recognized that the International Paper Company and the Pettebone-Cataract interests made claims to water rights at Niagara Falls under State laws (R. 384). The pertinent parts of Article 13 provide:

> 13. In the event that the United States or a new licensee shall take over the project of the licensee pursuant to the provisions of the Act, * * * such taking over of the project shall also be subject to the rights, *if any,* of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the

rights, *if any,* of International Paper Company. [Italics supplied.]

By application dated February 14, 1947 (R. 257), as supplemented March 7, 1947 (R. 306), licensee requested amendment of the license for Project No. 16 to include the so-called Pettebone-Cataract water rights which licensee proposed to acquire from its parent, Buffalo Niagara. The licensee, in its application, as supplemented, for amendment of the license, stated (R. 306–307) that:

> The license in its present form appears to us specifically to exclude from project property the water rights of the Pettebone-Cataract Paper Company and Cataract City Milling Company outstanding as of March 2, 1921. These rights were acquired by a predecessor of Buffalo Niagara Electric Corporation in 1925 and have since that year been used by us under lease in the generation of electric energy in the Schoellkopf Station which is a portion of the property under license in Project 16.
>
> It is the purpose of our requested amendment of license for Project 16, and we hereby so apply, to have the license amendment include in the project the so-called Pettebone-Cataract water rights which are to be acquired from Buffalo Niagara Electric Corporation.
>
> * * * * *
>
> We propose to include the payment of $728,415.48 for the Pettebone-Cataract water

> rights in the actual legitimate original cost of Project 16 upon acquisition of such rights.

This application was denied on the basis that licensee already possessed these water rights pursuant to its federal license (R. 387–393). The Commission held (R. 389):

> * * * In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 66. * * * The licensee already has the right, under the license, to use the 262.6 c. f. s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law.

Licensee did not seek the review of this decision, although warned by the Commission that it had thereby waived the right to reopen this issue (R. 592–593). In the instant case, the Commission, while considering its earlier decision *res judicata,* also held that it was correct in substance (R. 109).

Respondent filed a petition (R. 1) in the Court of Appeals for the District of Columbia Circuit for the review of the Commission's order (R. 115–117) of September 25, 1950, disallowing the payments and credits for use of water rights in de-

termining licensee's amortization reserve liability under Section 10 (d) of the Act for the period March 2, 1941, through December 31, 1946. The majority of the court below (Kimbrough Stone and Miller, JJ.) held that the Commission improperly refused to recognize any charges by other companies for the licensee's use of their water rights originating in leases made by the licensee's predecessors. The Court of Appeals held that a license under the Federal Power Act was a mere permission to use a state's grant of authority and conferred no right to divert water. "An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him." (R. 607–608.) The court concluded that the Act disclosed an intention to give full weight to state ownership of water power rights in navigable waters as grounded in state law. And since in its opinion these water power rights were valid usufructuary property rights under the law of New York which were left undisturbed by the paramount federal power, the payments and credits the licensee made in discharge of its contractual obligations were proper operating expenses.

Judge Bazelon, reading this Court's opinion in *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, to hold that in the Power Act Congress asserted the dominant federal authority over

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navigable waters, which superseded all private water rights affecting navigable waters except those expressly saved, and did not save the rights in question, dissented.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that Congress has not by the Federal Power Act and its predecessor statutes asserted its dominant authority over navigable waters of the United States in so far as concerns water power development.

2. In holding that state laws authorizing water power use of navigable streams and water power rights acquired thereunder are not superseded by the Federal Power Act and a license thereunder.

3. In holding that a Federal Power Act licensee, licensed to use the waters of a navigable stream through the project covered by the license, is also required to comply with state laws relating to the power use of such waters, and that the licensee is required to compensate other parties for taking their water power rights under state law, if the licensee uses the water covered by such state rights for power development under the license.

4. In holding that payments by the respondent company to others for their state water power rights were legitimate operating expenses for the purpose of computing the respondent's amortization reserve under Section 10 (d) of the Act.

SUMMARY OF ARGUMENT

The decision of the court below—that the Federal Water Power Act of 1920 did not abolish private, state created water power rights, and that, for the purposes of Section 10 (d) of the Act, these rights are binding upon the United States and the Federal Power Commission—is inconsistent with the decisions of this Court and defeats the purposes of the Act. Under that decision the United States and consumers must pay for "rights" which are subject to abolition by the United States without compensation. This construction of the Act finds no substantial support in the language, in the history, or in the purposes of the Act.

I

It is uncontrovertible that the United States has the power to appropriate or destroy water power rights in navigable streams without compensation. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The primary question in this case is whether such rights were terminated by the Federal Power Act of 1920.

A. The decision below frustrates the purposes of the Act. It forces the United States and consumers to pay for private water power rights, considerably reducing the economic advantages of a hydroelectric plant. Further, it subjects the financial soundness of licensed projects (*First Iowa Coop.* v. *Federal Power Commission*, 328

U. S. 152) to payments made by licensees to non-licensees, over which the Commission has no control. It gives value to "rights" which, in the absence of a license, are valueless; it gives private interests first mortgages on the water power of the Nation. Not only is there no clear and unequivocal manifestation of a Congressional purpose to effect this untoward result; the indications are quite the other way.

B. (1) The Federal Power Act of 1920 is based on the theory that the water power in the navigable rivers of the Nation belongs to the people and that the licenses granted under the Act are a means of making those natural resources available to the people. The Act consequently provides for the issuance of licenses to private corporations, with the project subject to recapture at the end of the fifty-year license period. The court below, therefore, clearly erred in holding that the license is merely a federal permission to use state created rights to water power.

(2) Consistently with this agency or chosen instrument theory, Congress asserted in the Act its paramount interest in the water power in navigable rivers, and transferred all its authority to its licensee. See Section 4 (e). That this assertion took the form of a prohibition of structures in navigable streams rather than the form of a real property condemnation is immaterial. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The

fact is that the United States claimed its dominant right in the navigable streams and private rights were, accordingly, extinguished.

C. Even without reference to this theory, it is clear that Congress completely preempted the field of the development of water power so as to eradicate private water power rights, which are inconsistent with that preemption. *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152. The expressions on the floor of Congress during the consideration of the Bill which became the Act make it quite clear that Congress was fully aware of the completeness of the control it was establishing in the Act. Unless private rights were expressly saved by the Act, they were necessarily abolished.

D. There is nothing in the Act which preserves private water power rights. Section 27, upon which the court below relied, does not preserve water power rights. Rather, it preserves rights of an irrigation or traditionally municipal nature, not power rights. *First Iowa Coop., supra.* And this conclusion is bolstered by the other sections of the Act.

II

The circumstances under which these private rights were allegedly created point up the untenability of the contention that the Act was not intended to affect the validity of such private rights.

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A. Under the laws of New York, these rights are highly attenuated, and the reserved power of the State has been actually exercised to such an extent that little but an empty shell is left. *Niagara Falls Power Co.* v. *Water Power & Control Commission,* 267 N. Y. 265; *Niagara Falls Power Company* v. *Duryea,* 185 Misc. (N. Y.) 696. Accordingly, assuming that these rights are valid to some extent under the laws of New York, they were subject to such a high degree of defeasibility that the term "vested" in its ordinary connotation cannot be applied to them.

Both sets of rights for which the payments in question were made, are the result of complicated transactions, by which particular water power rights were specially and unusually preserved. Even assuming that these transactions were at arms-length, the reliance of the respondent upon their validity should be given little weight, for these payments involve only five percent of the rights respondent uses, and the other 95 percent are the subject of potential claims of its own. Its own self-interest would not lead it to disavow the contracts. Indeed, these transactions point up the unlikelihood that Congress intended to impose upon the public the necessity of paying for such "rights."

C. The legislative history of the Federal Water Power Act of 1920, starting with the Burton Act of 1906, demonstrates clearly that Congress knew

of the diversion from the Niagara River by the respondent and its predecessors in interest, and considered such diversions usurpations, which were not to be recognized.

III

The Federal Power Commission has the authority to disallow actual expenditures if they are not of a legitimate nature. The disallowance of the payments in question was, for the reasons above stated, quite proper.

Moreover, even if there were some aspects of "legality" to the transactions as between the parties, it is clear that, insofar as the Federal Power Commission and the United States are concerned, the transactions have no binding effects. *Board of Regents* v. *Carroll,* 338 U. S. 586. This Court has itself indicated that such type of transactions need not be recognized as binding upon the United States just because they may be binding upon the parties. *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359. Consequently, even if the respondent had a legal obligation to make the payments in question, they were properly disallowed by the Federal Power Commission.

ARGUMENT

In 1913, contemporaneously with the introduction in the Congress of the bills which eventually became the Federal Water Power Act of 1920, this Court stated in no uncertain terms, "that the

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running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 69. Subsequently, in 1940, twenty years after the passage of the Power Act, this Court was faced with the contention (and forty-one states joined in support of the argument) that certain aspects of the Act were unconstitutional, as a violation of the reserved powers of the states under the Tenth Amendment. This Court rejected the contention, repeating with approval the language of *Chandler-Dunbar* and further stating, "Exclusion of riparian owners from [a great navigable stream's] benefits without compensation is entirely within the Government's discretion. * * * [T]here is no private property in the flow of the stream." *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 424, 427.

Under the Federal Power Act, the Federal Power Commission is charged with the duty of issuing licenses for the development of electrical power. Accordingly, the Commission has complete regulatory control over the terms of the license and over the licensee. The issue in this case arises out of the requirements of Section 10 (d) of the Act. This section provides that, after the first twenty years of operations, a portion of the excess profit of the licensee shall be transferred to an amortization reserve account which, at the discretion of the Commission, shall either be held until the termination of the license or

applied in reduction of the net investment, and that the license shall state what rate of return is to be considered excessive and what percentage of the surplus earnings is to be transferred to the amortization reserve. Respondent's license provides that earnings in excess of six per centum are to be considered surplus and that one-half of such surplus should be transferred to the amortization reserve (R. 4).

The proper computation of the amortization reserve is of great importance to the parties, since, as mentioned above, it serves to reduce the licensee's net investment, and the latter in turn determines four important and far reaching financial issues, viz: (a) the price the United States has to pay should it decide to recapture the project at the end of the fifty-year licensing period (Section 14, Stat. App. 16); (b) the rental due if the United States should requisition the project during a period of national emergency (Section 16, Stat. App. 17); (c) the price the United States would have to pay for the project if it should acquire it at a judicial sale following the revocation of the license (Section 26, Stat. App. 24); and (d) a basis for rate fixing (Section 20, Stat. App. 20).[8]

[8] The function intended to be served by this amortization reserve was probably best expressed by Representative Parker in his discussion of an earlier version of Section 10 (d) (56 Cong. Rec. 9284):

"* * * it is the duty of the commission * * * to find out what the earnings have been. If they are less than a fair

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It is undisputed that the Federal Power Commission has the responsibility of disallowing payments which are not "legitimate" in nature. See p. 60, *infra*. Nevertheless, the court below has held that the tenuous, almost transcendental water power rights for which the respondent makes annual payments, are valid, as against the Federal Power Commission and the United States Government, and that the Commission erred in disallowing the payments. This holding is inconsistent with the decisions of this Court, and goes a long way to defeat the purposes of the Federal Power Act. Under this decision the United States will have to pay for privately owned water rights, which are subject to complete abolition by both the State and the Federal Government without compensation, which have been completely severed from the land, and which are obviously worthless without the approval of the Federal Power Commission. The development of the

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return upon the cost of the investment, they will go to the licensee. If they are more than a fair return—and what will be a fair return will be expressed in the lease—then they may be applied and shall be applied under the contract, either to the reduction of the original cost and of the amount that the Government will have to pay upon recapture, or else they will be applied to a reduction of rates, so that the public will get the benefit * * *."

See also remarks of Representative Anderson, 56 Cong. Rec. 9282; Representative Esch, 56 Cong. Rec. 9957, 57 Cong. Rec. 4638; 1918 Print of Hearings Before the Special House Committee on Water Power (pp. 650–659).

Niagara River, one of the greatest sources of hydroelectric power in this nation, and one of the chief concerns of Congress in its consideration of the Federal Water Power Act of 1920, will be hobbled by these payments for private water rights—originating out of complicated intercorporate transactions and deriving only from state grants and temporary federal permits—saving only the circumstance that the United States, by some eminent domain proceedings, shall formally confiscate the "rights." This alternative is as dubious as it is speculative. The Federal Water Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Coop.* v. *Federal Power Comm'n,* 328 U. S. 152, 180. And that power is as broad as the commerce power itself. *United States* v. *Appalachian Power Co., supra,* at 423–424, 427. To hold, as did the court below, that the United States is restricted by these privately owned water rights, is to raise the formalistic terminology of property law to the level of federal power. There is no substantial basis for this result, in the language, in the history or in the purposes of the Federal Power Act.

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I

THE FEDERAL WATER POWER ACT OF 1920 ELIMINATED PRIVATE WATER POWER RIGHTS IN NAVIGABLE STREAMS

Whatever may be said about the existence and validity of the water power rights for which the payments in question were made, it is indisputable that the United States has the dominant right in navigable rivers; that under the commerce clause it may control, improve or regulate such rivers without restraint by prior private "rights" or by state authority; and that, assuming such rights are "vested" and otherwise unassailable, the United States could nevertheless appropriate or destroy them. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87; *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423–424; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595–597; *United States* v. *Commodore Park*, 324 U. S. 386, 390; *United States* v. *Willow River Co.*, 324 U. S. 499, 509; *United States* v. *Kansas City Insurance Co.*, 339 U. S. 799, 804–808. It is further uncontrovertible that when the United States exercises this dominant right, it need not pay compensation to the person who under state law may hold "technical" legal title (*United States* v. *Commodore Park, supra*). As has been pointed out by this Court (*United*

States v. *Appalachian Power Co.*, 311 U. S. 377, 424):

> * * * The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion. [Italics added.]

It is therefore an uncontrovertible starting point that Congress had the power to extinguish without compensation the water rights involved in this litigation. It is our position that in enacting the Federal Water Power Act of 1920 Congress (a) asserted the Federal Government's dominant right over water power rights in navigable streams, and extinguished without compensation all private water power rights under state law, and (b) so occupied the field that it necessarily terminated water rights based on state law to the extent that they were not expressly saved from supersedure, and that the water power rights here involved were not so saved.

A. THE PURPOSES OF THE FEDERAL WATER POWER ACT WOULD BE FRUSTRATED WERE PRIVATE WATER POWER RIGHTS STILL TO BE RECOGNIZED

Despite the fact that it conceded that the United States had the superior right to the flow of a navigable stream (R. 600), the court below

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held that the Federal Water Power Act of 1920 continued to recognize pre-existing water power rights. Under this decision, the United States will have to pay for those rights upon recapture and every year consumers will have to pay for those rights in their rates. In this case, for example, the Company pays out $136,800 per year for the "private water power rights" as operating expenses. As these rights represent only five percent of the power the company uses, the consumers would be forced to pay almost $2,600,000 annually, were the remaining "rights" in private hands and were similar charges assessed. To a substantial extent the recognition of such rights vitiates the advantage of a hydro-electric plant, whose benefits lie mainly in its low operating expenses, which usually more than offset its higher initial cost and interest charges. Third Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1923, p. 7. Indeed, the recognition of such rights may very well have the effect of curtailing the development of hydro-electric power in those marginal projects which, unlike ~~those~~ that in the Niagara here, are not so readily susceptible of economic development of water power.

Further, despite the fact that the Act demonstrates "the obvious concern [of the Federal Government] in maintaining control over [the licensed project's] engineering, economic and financial soundness * * *" (*First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, 172), that concern is subjected, under the decision below,

to payments made by licensees, over which the Commission has substantially complete control, to non-licensees, over which the Commission has no control, and which, under the decision below, could charge for the rights concerned to a point where effective regulation of licensees would be impracticable.

This decision means that private water power rights, which are worthless in the absence of a Commission license, must be paid for by anyone who does obtain a license. Indeed, under the decision below, the State could create water power rights in non-licensees even after the issuance of a license, and thus inordinately hamper the effective use of water power. The distinction between private ownership of flowing waters and a usufructuary property right, drawn by the court below (R. 594–595), accords to private interests first mortgages on the water power of the Nation, and elevates those interests above the Federal Government and the consumer—a complete reversal of the purposes of the Act.

In large part, the decision below rests upon the holding that the federal license was not a primary or original source of authority inasmuch as, according to the court below, the issuance of a license to use navigable water power "negates the idea that it declares all such water necessary for use in commerce," and is an implicit determination by the Commission that "the entire flow of the Niagara was not required for navigation or

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any other use in interstate commerce" (R. 607). But this premise is completely inconsistent with the decision of this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 277, 426, that "navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."[9]

In sum, the holding below is so completely inconsistent with the admitted power of the United States and with the apparent objectives of the Federal Water Power Act of 1920, that it can stand only if there is some clear and unequivocal manifestation of Congressional intent to permit these private rights in the flow of the navigable streams of the nation to encumber the development of the water power of the nation. As we shall show, there is no such manifestation. Indeed, the substantial indications are that Congress intended to "wipe the slate clean" when it enacted the Federal Water Power Act of 1920. See *Niagara Falls Power Co.* v. *Power Comm'n*, 137 F. 2d 787, 790–791 (C. A. 2, per Learned Hand, J.), certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

B. CONGRESS ASSERTED ITS DOMINANT SERVITUDE TO THE WATER POWER IN NAVIGABLE RIVERS

(1) *The Licensee is the Agent, i. e., the Chosen Instrument, of the United States.*—The Federal

[9] See also *Gibbons* v. *Ogden*, where Chief Justice Marshall decisively rejected the view that a federal license under the commerce power was merely a permission to use a state grant of authority. 9 Wheat. 1, 69, 211 *et seq.*

Power Act is based on the theory that the water power inherent in the navigable rivers of the Nation belongs to the people and that the licenses granted under the Act are a means of making those natural resources available to the people. Ideologically and historically the Federal Power Act goes back to the conservationist movement of the opening of this century, as articulated by the veto messages of Presidents Theodore Roosevelt and Taft denying approvals to bills authorizing the construction of dam sites across navigable rivers[10] on the ground that this legislation gave away the property of the people without adequate safeguards. *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152; *Chapman* v. *Federal Power Commission,* 345 U. S. 153, 167.

In 1908, President Theodore Roosevelt based his veto message relating to the Rainy River Power Project (42 Cong. Rec. 4698) on the following considerations:

> * * * This natural wealth is the heritage of the people. I see no reason for giving it away. * * *
>
> * * * * *
>
> The present policy pursued in making these grants [special acts of Congress authorizing hydro-electric developments] is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown, and

[10] These bills were required by Section 9 of the River and Harbor Act of 1899 (30 Stat. 1151, 33 U. S. C. 401) (Stat. App. 52).

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> granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use. * * *

A year later, in his Veto Message Relating to the Building of a Dam across the James River (43 Cong. Rec. 978–980), President Roosevelt adverted to the same subject:

> * * * This bill gives to the grantee a valuable privilege * * *.
>
> * * * * *
>
> To give away, without conditions, this, one of the greatest of our resources, would be an act of folly. * * *
>
> * * * * *
>
> * * * I consider myself bound, as far as exercise of my executive power will allow, to do for the people, in prevention of monopoly of their resources, what I believe they would do for themselves if they were in a position to act.[11] * * *

These veto messages resulted in an impasse, for even if these natural resources were consid-

[11] See also the Muscle Shoals veto of President Theodore Roosevelt of March 3, 1903, 36 Cong. Rec. 3071; and the Coosa River veto of President Taft of August 24, 1912, 48 Cong. Rec. 11796.

In his James River Veto Message President Theodore Roosevelt prophetically warned that the power companies would try to seek refuge in the twilight zone between federal and state law (43 Cong. Rec. 979). Thus, while respondent is here stressing that the Federal Government did not seek to affect state created riparian rights, it has apparently tried to escape state regulation on the basis of the federal origin of its license. Cf. *Niagara Falls P. Co.* v. *Water P. & C. Commission*, 267 N. Y. 265, 276.

ered as belonging to the Nation, the Federal Government, at that time, was in no position to exploit them. And the resulting delay in the development of cheap water power was heavily felt during World War I.[12]

The Federal Water Power Act consequently proceeds on the theory that although the water power resources belong to the Federal Government (see, *e. g.*, Rep. Anderson, 56 Cong. Rec. 9282), they should be developed by private enterprise where public development is not practicable.[13] Hence, the Act provides for the issuance of licenses to private corporations, the public interest being protected by strict supervision and the provision that the project is subject to recapture at the expiration of the fifty-year period for which the license is granted.[14] As Representative Anderson stated:

[12] Cf. H. Rep. No. 61, 66th Cong., 1st Sess., pp. 2–5.

[13] Cf. Section 7 (Stat. App. 9), giving priority in the issuance of licenses to the United States, states, and municipalities.

[14] See *Chapman* v. *Power Commission*, 345 U. S. 153, 169–170:

"Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development and preclude all further congressional action. The Commission would, as it did here, simply express its judgment that at the time, private development of the site was consistent with the general conception of the way in which the Roanoke River Basin should be developed. For, at any time short of the fifty years in which a site automatically becomes available to the Government *without compensation*, the Govern-

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> The present bill represents a scheme of development between these two extremes, and contemplates development by private capital under leases of 50 years, which will reserve to the Government the right to supervision of operation and rates and provide for the *recapture of the property* on the expiration of the license period. [56 Cong. Rec. 9282] [Italics supplied.] [15]

It is thus the fundamental theory of the Act that the Federal Government grants to the licensee the right to exploit governmental assets in consideration of the grantee's undertaking to develop this national resource,[16] and that the licensee

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ment may determine that the public interest makes it more desirable that the project be operated publicly and has the right then, by appropriate steps, to take over the project." [Italics supplied.]

[15] See also Sen. Rep. No. 180, 66th Cong., 1st Sess., p. 3:

"We should pass legislation which leads private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible."

See also *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180–181.

[16] "The grant of a license, being a privilege from the sovereign, can be justified only on the theory of resulting benefit to the public." *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861, 863 (C. A. D. C.), certiorari denied, 287 U. S. 639; *Northern States Power Co.* v. *Federal Power Commission*, 118 F. 2d 141, 144 (C. A. 7); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, 288–289 (C. A. D. C.), certiorari denied, 317 U. S. 652.

is basically an agent or chosen instrument of the Government.[17] This statutory theory that the Government grants its own rights to the water power to its licensee[18] is utterly inconsistent with the concept advanced by the court below that its license is merely superimposed over persisting state created rights to the same water power[19] and that the federal licensee is bound to pay its toll to the owner of such private rights.[20]

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[17] The notion that the utility is the Government's agent goes back to President Taft's Coosa River Veto of August 24, 1912, 48 Cong. Rec. 11796. See also statement of Sen. Newlands at 49 Cong. Rec. 2702; *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 616 (M. D. Ala.).

[18] It will be noted that the scope of rights granted by the license is identical with the range of rights claimed by the Government as the result of the exercise of its dominant power. See *infra*, pp. 32–37.

[19] Learned Hand, J., said in *Niagara Falls Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792:

"The purpose being to conserve all water power, so far as it was national, it would have been an anomaly to exempt anyone—*states or individuals*—who by an earlier unauthorized occupation had assumed to appropriate any part of this natural resource. No prescription could in law run against the nation; we must not impute to Congress any willingness to grant prescription as a favor. * * * What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams, or to impair their navigability?" [Italics added.]

[20] In this connection it may be pointed out that the United States refrained from imposing upon its licensee a charge for the use of the water power on the ground that such

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(2) *The Assertion by the United States of Its Dominant Servitude Wiped Out Private Rights.*— The circumstance that the United States exercised its dominant servitude over water power rights and granted respondent a license of the rights thus asserted is not of itself, however, conclusive for the decision of this case. Conceivably, the exercise of this paramount right might not have gone so far as to prevent the private holder of the water power rights from asserting his rights or a remnant of them against respondent. This is particularly true since the private power rights and the exercise of the federal servitude are couched in different terms. Thus, under New York law—as under the law of most of the states—the water power rights are defined in terms of riparian ownership.[21] The exercise of the federal dominant right, on the other hand, takes the form of prohibition of the obstruction of the flow of a navigable river or of main-

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exaction would not be borne by the licensee but passed on to the consumer. See, *e. g.*, 59 Cong. Rec. 1572. It would be incongruous to assume that Congress intended to perpetuate the rights of private individuals to levy similar charges on its licensee although it had the power to terminate them.

[21] See, *e. g.*, *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38, 44–45:

"* * * The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom, for any domestic or hydraulic purpose to which he may decide to apply it."

taining installations for the development of power along it. We shall show, however, that Congress exercised its rights to a degree that private water power rights may not interfere with the operation of a license.

(a) Section 10 (a) of the Act (Stat. App. 10) requires that the license to be granted

> be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. * * *

And the licensing provision, Sec. 4 (d) (now Sec. 4 (e) (Stat. App. 6)), prohibits by implication all those acts for which license will be granted.[22] Thus, all the powers the Government has claimed by the Act are intended to be transferred to the licensee.[23] Under Section 4 (e), the Federal Power Commission has authority to issue licenses for the:

> purpose of constructing, operating, and maintaining dams, water conduits, reser-

[22] *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424. Section 23 (b), as amended by the Federal Power Act of 1935 (Stat. App. 22), now contains an express prohibition which, significantly, is virtually identical with the license granted under Section 4 (e) as far as navigable rivers are concerned.

[23] This feature of the Act reinforces the point made *supra*, pp. 25–30, that the licensee stands in the same position as the Federal Government.

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> voirs, power houses, transmission lines or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from[24] or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States. * * *[25]

The problem becomes whether this grant of license is sufficiently extensive so as to supersede all the riparian water power rights existing under state law as far as the United States and its licensee are concerned.

(b) This very problem was presented to this Court in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, and was answered in the affirmative. In that case the United States had condemned "all lands and property of every kind and description north of the present St. Marys Falls Ship Canal * * * and the international boundary line." 229 U. S. at 56. For several years

[24] The word "from" was inserted in this section on motion of Senator Wadsworth "so that in the event of diversion of water to a distance from the stream, which could not be called 'along' the stream, the case would be covered." 59 Cong. Rec. 1482. The purpose of this amendment was presumably to assure the extension of the Act to respondent's installations along the hydraulic basin (R. 588).

[25] Prior to the 1935 amendment, the Act referred to "the navigable waters of the United States" rather than to "streams and other bodies of water * * *"

prior to that condemnation Chandler-Dunbar Co. had operated a power plant in the rapids at Sault Ste. Marie under revocable permits issued by the Secretary of War.[26] The circuit court before which the condemnation proceedings were held decided that under state law Chandler-Dunbar was the owner of riparian water power rights[27] and awarded to the company $652,332, $550,000 of which represented the estimated value of the water power. 229 U. S. at 58. This Court reversed. It held that the owner was entitled to compensation for its tangible property, movable or real (229 U. S. at 68), but with respect to Chandler-Dunbar's claim to compensation for its water power rights, this Court pointed out that this demand hinged on the question whether these power rights constituted private property (229 U. S. at 69). It held that whatever private property rights might exist in the flow of the stream depended completely on the right to maintain in the river the obstructions necessary to utilize the river's powers. This Court said (229 U. S. at 69–71):

> * * * that the running water in a great navigable stream is capable of private ownership is inconceivable.

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[26] The act authorizing this condemnation terminated every permit, license, or authority issued by the War Department. 229 U. S. at 57.

[27] Transcript of Record, Nos. 783–786, October Term, 1912, pp. 406–407.

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> Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes.
>
> * * * * *
>
> * * * But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. [Citing authorities.] It is for Congress to decide what is and what is not an obstruction to navigation. [Citing authorities.]
>
> * * * * *
>
> Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation?

And the Court concluded this argument by stressing that the company

> had no property right in the river which has been "taken" (229 U. S. at 74).

Chandler-Dunbar was reaffirmed by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423–424, where it was pointed out that

the possession of a state license to use the water power was immaterial against the dominant right of the United States. Again, in *United States* v. *Willow River Co.*, 324 U. S. 499, 509, this Court interpreted the *Chandler-Dunbar* case as holding that a shore owner has no appurtenant property rights in two natural levels of water in front of its land or to the use of the natural difference between the two as a head for power production.

The court below sought to distinguish *Chandler-Dunbar* on the ground that the statute there involved contained an express determination that all the waters in the St. Mary's River were needed for the purposes of navigation and that the Federal Power Act, which does not contain so broad a statement, did not intend to extinguish riparian rights in so sweeping a way (R. 600–602). The stress on the particular nature of the statute in *Chandler-Dunbar* is obviously misplaced. That decision itself points out (at pp. 74–75) that Chandler-Dunbar had no property rights in the river (*supra*, p. 35). Moreover, neither *Appalachian Power* nor *Willow River* contains a qualification to the effect that the existence of private water power rights turns on the extent to which the waters in question were needed for navigation. To the contrary, *Appalachian Power* (at 423–427) stresses that in the Federal Power Act the Congress exercised its dominant right, not only in the limited interest of navigation, but for the broad purposes of commerce in general.

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In other words, this Court has recognized that state water power rights couched in terms of riparian rights, and the federal easement defined as the authority to maintain structures in or along the river, cover the same area and that the prohibition of the latter means that the former rights, which can be exercised only by means of maintaining structures, have been extinguished, as far as the United States (and its licensee)[28] are concerned.[29]

In sum, in view of this Court's decisions and of the language of the Act and its general purposes, we doubt that there could have been a more complete appropriation by the Federal Government of the flow of navigable rivers. But assuming that there do exist some areas left in which private riparian rights might be permitted to have effect,[30] it is incontrovertible that the United

[28] See *supra*, pp. 25–30.

[29] The United States, having the power to exercise its paramount rights without compensation, has not chosen to indemnify the riparian owners for the loss of the water power rights. Such action would have been inconsistent with the philosophy underlying the Act that these rights belonged to the nation (*supra*, pp. 25–30).

[30] This involves especially the rights of riparian owners *inter sese* and as against third persons where no rights based on the Federal servitude are in issue. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 70; *United States* v. *Willow River Co.*, 324 U. S. 499, 508; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373; *International Paper Co.* v. *United States*, 280 U. S. 399.

In the *Grand-Hydro* case, the question was whether in computing the condemnation value of a water power site on the Grand River, a nonnavigable river, pursuant to Okla-

States, in the Federal Power Act, has claimed its dominant right to prohibit or to license the maintenance of structures in navigable rivers for the development and utilization of water power and has granted to respondent the right to maintain such structures for the development and utilization of water power. It follows from *Chandler-Dunbar* (see *supra,* pp. 33–35) that riparian water power rights, such as those for which the payments in question were made, were extinguished to the extent that they were inconsistent with this grant.

C. CONGRESS COMPLETELY PREEMPTED THE FIELD OF THE DEVELOPMENT OF WATER POWER FROM NAVIGABLE STREAMS, AND PRIVATE RIGHTS INCONSISTENT WITH THAT PREEMPTION WERE TERMINATED

The foregoing section is designed to show that in the Federal Water Power Act of 1920 Congress asserted its exclusive title to the water power in the navigable waters of the nation. Assuming *arguendo* that this is not so, it nevertheless is clear, from a review of the genesis of the Act and of

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homa law, the jury might take into consideration the availability of the property as a dam site. Although the condemnor held a Federal Power Commission license, it did not base its right to condemnation upon the Federal Power Act or the license issued to it thereunder (335 U. S. at 364, 366). Holding that only Oklahoma law was applicable, pursuant to which the owner was entitled to the value as a power site (335 U. S. at 372–373), this Court expressly pointed out that the decision might be different if the United States or its licensee sought to acquire the property under the Act or by virtue of its license. 335 U. S. at 373. In the instant case, of course, it is the interest of the United States which is directly involved.

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the decisions of this Court interpreting that history, that Congress, considering that the water power in navigable rivers was within the dominion of the United States, specifically exercised its dominant servitude so as to oust all conflicting laws of the states,[31] including any creating private rights in water power.

In *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, this Court was faced with the contention that an applicant for a Federal Power Commission license had first to show that it had complied with the applicable state law relating to the construction of dams and the diversion of water for power purposes. Analyzing the relation between the states and the Federal Government which had been created in the Federal Power Act, this Court pointed out the "detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (328 U. S. at 181). It further held that "in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course" (328 U. S. at 176). It is, accordingly, indisput-

[31] In *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 174, this Court pointed to the carefully designed statutory pattern designed to prevent divided authority over any one subject. Hence, a finding that the Federal Power Commission was granted *some* authority over water power rights would be sufficient to make the federal control complete.

able that with the enactment of the Federal Water Power Act of 1920, the Federal Government entered the field of water power for the first time in a truly comprehensive manner[32] (328 U. S. at 180–181; see also *Federal Power Commission* v. *Idaho Power Company,* 344 U. S. 17, 23). The Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." 328 U. S. at 180. And that power is as broad as the commerce power itself. *United States* v. *Appalachian Power Co., supra,* at 423–424, 427.

Congress was well aware of the completeness of the federal control it was establishing in the new statute. Thus, Congressman Lee, explaining the committee report to the House, stressed:

> Under the terms of the bill the public *retains complete control* of water-power rights on the public lands and in the navigable rivers. No development can be made by any agency other than the

[32] Earlier attempts had been the piecemeal legislation of the River and Harbor Acts of 1890 and 1899, statutes granting authority to build specific water power projects, and temporary legislation dealing with the diversion of water at Niagara Falls, such as the Burton Act of June 29, 1906 (34 Stat. 626) and the Joint Resolutions of January 19, 1917, 39 Stat. 867; June 30, 1917, 40 Stat. 241; June 29, 1918, 40 Stat. 633; July 12, 1919, 41 Stat. 163 (R. 416, 457–471).

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> United States itself, except under the authority of and in accordance with the provisions of a license issued by the commission. * * *
>
> * * * * *
>
> Whenever licenses are issued for developments by private capital, *full public control is retained* over the construction, maintenance, and operation of the project. * * * [59 Cong. Rec. 6527]. [Italics supplied.]

Senator Wadsworth, in charge of the bill in the Senate, made similar statements to demonstrate the sweeping control to be exercised by the Federal Government. Significantly, he spoke with particular reference to the power rights involved in this very litigation:

> However that may be, let me say to the Senator from Mississippi [Senator Harrison] that the one company cannot act or do anything in the future with respect to the diversion of water from above the Falls in contravention of the treaty or without the permission of this commission created under the bill. The company now operating at Niagara Falls will fall *completely* under the jurisdiction of the commission just as any other water-power company in the United States falls under it. * * *
>
> They fall under exactly the same jurisdiction; the Government wields the same power of them. Under the terms of this

> bill the Government can condition the issuance of a permit as it sees fit, and the Niagara company must comply or it can not divert any water * * *. [59 Cong. Rec. 1485.] [Italics supplied.]

Again (at 59 Cong. Rec. 1486), Senator Wadsworth exposed the exclusive powers assumed by the Government under the bill:

> This bill does not confer any perpetual rights for the diversion of water in Niagara Falls upon anybody. The water power company that is there now and all the companies that may be organized there in the future to develop power upon other parts of the river, we will say below the Falls, must come to the commission and get a license, and the commission can prescribe the conditions upon which the license is to be issued. * * *
>
> * * * The Federal Government will be in *complete* control * * *
>
> * * * Our Government has control of the shore on its side of the river and to midstream * * * So long as this bill is careful to clothe the Federal Government through this commission with power to control this question, to straighten out the uncertainty that has existed at this particular point for 30 years as to the right of anybody to do anything, then I think we are perfectly safe.[33] [Italics supplied.]

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[33] *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792. Judge Learned Hand interpreted those statements as "un-

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Inasmuch as the continued existence of private water power rights is completely inconsistent with such a comprehensive control by the Federal Government (see *supra,* pp. 22–25), those rights were necessarily abolished by the preemption of the field by the Federal Government, unless they were expressly and specially saved by the Act. This, we shall show, was not done.

D. THERE IS NO BASIS FOR THE CONTENTION THAT PRIVATE WATER POWER RIGHTS WERE SPECIALLY SAVED BY THE ACT

Inasmuch as Congress intended to make full use of its legislative powers in the field, it recognized "the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome." *First Iowa Coop.* v. *Federal Power Commission, supra,* at 175. But, contrary to the belief of the court below (R. 605), the Act does not save the water power rights here involved; indeed, it contains a provision expressly designed to prevent their preservation.

As this Court has pointed out in *First Iowa Coop.* v. *Federal Power Commission, supra,* at 175–180, Section 27 is the saving clause of the Act. It provides:

> * * * That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribu-

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equivocal assertions that the petitioners' existing rights would not be recognized."

> tion of water used in irrigation, or for municipal or other uses, or any vested property right acquired therein.

This provision was fully analyzed in the *First Iowa* case, *supra,* at 175–176:

> * * * The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to *such* proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be in the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal'." *Alabama Power Co.* v. *Gulf Power Co.,* 283 F. 606, 619. [Italics supplied.]

Accordingly, this Court has determined that Section 27 is limited to the preservation of legislation concerning irrigation or municipal uses of

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water and proprietary rights of the same or related nature. Water power rights in navigable (eastern) rivers obviously do not fall into those exempted categories.[34] This interpretation is supported by the legislative history of Section 27, for it is derived from reclamation laws[35] and public lands bills,[36] not from legislative projects dealing with water power.[37] It is significant that the statements concerning Section 27[38] set forth

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[34] This was the express holding in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 619 (N. D. Ala.), quoted with approval by this Court in the *First Iowa* case, *supra.*

[35] *United States* v. *Gerlach Livestock Company*, 339 U. S. 725, arose under the Reclamation Act of 1902, and hence the invasion of water rights was considered compensable.

[36] Cf. *First Iowa Corp.* v. *Federal Power Commission*, 328 U. S. 152, 176–177 (fn. 20).

[37] The Federal Water Power Act of 1920 was the result of the consolidation of originally separate legislative projects dealing with public lands and water power. Sen. Rep. 180, 66th Cong., 1st Sess., pp. 5–6.

[38] There is nothing necessarily inconsistent between this interpretation of Section 27, and *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, which involved very unusual circumstances, was decided without participation of the Federal Power Commission, and without the presentation by the parties of a careful analysis of the Act and its legislative history. Moreover, in the *Ford* case, the right of the Little Falls Co. to maintain its dams in the river was not questioned or considered. Whatever force the decision may have had seems to have been spent with the later decision of this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. And finally, the question of the rights between the parties in *Ford* is a completely different one from that between the licensee and the Commission. See *Board of Regents* v. *Carroll*, 338 U. S. 586; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359.

in the Brief in Opposition at pp. 11–12 all referred to western irrigation rights.[39]

The court below based its conclusion that Congress sought to preserve water power rights not only upon the express saving clause, which it misread, but also by way of implication on the circumstance that the Act repeatedly refers to such interests. This Court, however, has held in the *First Iowa* case, *supra,* that Section 27 is the sole saving clause of the Act, and that a substantive policy, such as the saving of State laws and substantive rights, should not be based on implication. 328 U. S. at 177. The Act itself contains a provision expressly designed to pre-

[39] The statement of Representative LaFollette (56 Cong. Rec. 9810) quoted in the *First Iowa* case (328 U. S. at 174) refers to the property rights in the fast lands and has no bearing on any interests in the raw water.

The House indicated at another occasion its feeling that the administration of and the rights created under the new Act should not previously be burdened with the remnants of the late state system of regulating water power rights. Thus, the House conferees successfully insisted upon the elimination of a Senate amendment which provided:

"* * * that no contract which shall have been lawfully made prior to the passage of this act, not extending beyond the term of the license, for power, light, heat or water, or for the service or delivery of the same to be furnished from any project works, and to which such project works, or the person, company, or corporation constructing, owning, or operating the same shall be subject, shall be affected by any license under this act, and no such person, association or corporation shall be released from any lawful obligation by reason of this act or any license granted thereunder" (H. Rep. No. 910, 66th Cong., 2d Sess., p. 13; See also 59 Cong. Rec. 6385).

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vent the preservation by way of implication of water power rights not based upon federal grants. When the Federal Water Power Act was debated in the Senate, Senator Wadsworth, who, as indicated above, was in charge of the bill, secured an amendment resulting in the insertion of the words "confirming or otherwise affecting any claim" in Section 23 (a) (Stat. App. 22). The purpose of the amendment was explained by Senator Wadsworth as follows (59 Cong. Rec. 1482):

> * * * I have a difficult situation in mind. It is one that the Senator from Wisconsin has often spoken about—the Niagara Falls situation. It so happens that the rights that those companies received there years and years ago, as I understand and recollect, came as grants from the State of New York; and those companies—rightly or wrongly, I do not know which—have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water and the generation of power. It might be said that this claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. *Now, I do not want this bill in any way to confirm that claim.* [Italics supplied.]

Water rights are mentioned in Sections 3 (11), 4 (b), 9 (b), and 14 of the Act (Stat. App. 4, 5, 10, 16). This Court has pointed out in the *First Iowa* case (328 U. S. at 177 ff.) that Section 9 (b)

does not preserve any rights but merely seeks to secure adequate information. Section 4 (b) serves analogous purposes; Section 3 (11) is merely a definition and may easily be read as referring to the water rights of the licensees resulting from the federal grant. Section 14 provides that upon recapture of a project the United States shall pay compensation for "water rights." This, however, does not mean that *all* water rights have been considered preserved. Section 14 easily may be read as limited to such water rights as were preserved by Section 27.[40]

It is clear, therefore, that state-created water power rights were not preserved by Section 27 of the Act.

II

THE CIRCUMSTANCES UNDER WHICH THESE WATER POWER RIGHTS WERE CREATED SERVE TO SHOW THAT THE FEDERAL WATER POWER ACT OF 1920 CANNOT BE READ TO PRESERVE PRIVATE RIGHTS IN WATER POWER

The previous discussion shows that the Federal Water Power Act, generally, eliminated the basis of claims to private water power rights. Moreover, the circumstances under which these particular rights were allegedly created point up the untenability of the contention that the Act was not intended to affect the validity of such private

[40] Cf. the dissenting opinion of Bazelon, J., R. 611–612. And this interpretation may well apply to all the references to water rights in the Act.

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rights. For these alleged rights were created out of state grants and licenses, admittedly subservient to the rights of the State of New York, and were the result of corporate transactions wherein the licensee had little cause to repudiate the "rights." Further, they allegedly attach to the Niagara River, one of the foremost sources of hydro-electric power in the Nation—the very river which was pointed out during the Congressional consideration as representative of the hampering effect of such claims; indeed, these were the very rights which were expressly designated as not being confirmed by the passage of the Act.

A. THE WATER POWER RIGHTS INVOLVED IN THE INSTANT CASE ARE OF SUCH A HIGHLY ATTENUATED NATURE UNDER STATE LAW AS TO BE NONRECOGNIZABLE UNDER FEDERAL LAW

Even assuming that in the Act Congress did intend to recognize *some* private water power rights, it is highly doubtful, in view of their origin, that the rights in question could satisfy any reasonable test of validity.

Under the laws of New York the riparian owner generally has a right to the natural flow of water in a stream along his land, and this right has been classified as a corporeal hereditament and a real estate (*Matter of Van Etten* v. *City of New York,* 226 N. Y. 483, 486; see also *International Paper Co.* v. *United States,* 282 U. S. 399, 405).[41] It also

[41] The *International Paper* case has no bearing on the issues presented here, inasmuch as it involved events antedating the enactment of the Federal Power Act and the surrender of

has been held that this right can be severed from the riparian land by way of grant, condemnation, relinquishment, or prescription. *United P. B. Co.* v. *Iroquois P. & P. Co.*, 226 N. Y. 38, 47. This, however, does not mean, as the court below apparently held, that New York considered the water rights involved as absolutely vested common law rights, the destruction of which is not readily imputed to Congress (R. 605). For the same New York decisions make it clear beyond doubt that this incorporeal hereditament is subject to the superior rights of the State. *United P. B. Co.* v. *Iroquois P. & P. Co., supra,* at 45, 49.

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the International Paper Company's leases to the grantor (*supra*, pp. 5–6). Thus, the Paper Company had an agreement with respondent's predecessor, itself a Federal licensee under the Act of June 29, 1906, 34 Stat. 626, to use certain amounts of water for power purposes. This Court held that a diversion of that water in 1918 by the Secretary of War from the Paper Company rendered the United States liable in damages to the Paper Company. Contrary to the transfer of federal permission from an original licensee to International Paper Company recognized in that case, Section 8 of the Federal Power Act (Stat. App. 10) prohibits transfer of license rights without written approval of the Federal Power Commission. Admittedly, Commission approval has not been given here (R. 306). Moreover, that case involved a taking under the Fifth Amendment and not an assertion of the Government's dominant easement from navigable rivers. As this Court held, the Secretary of War made no attempt to revoke the license, but proceeded "on the footing of a full recognition of the Paper Company's rights" (as a subpermittee or tenant of the Power Company (R. 419–420)), and of the Government's duty to pay for the taking that he purported to accomplish. 282 U. S. at 407–408.

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With respect to the water power at Niagara Falls the reserved power of the State has been exercised to such an extent that little but an empty shell has been left of the common law riparian water rights. As pointed out above (*supra,* pp. 5–7), respondent's rights to use the water power at Niagara Falls are not based upon its ownership of the shore but upon grants made by the State of New York in the 1890's. Hence, it has been well recognized that the water power rights asserted here are of a highly qualified and tenuous nature, and might even be in conflict with the Constitution of the State of New York.[42] As the New York Court of Appeals said (*Niagara Falls P. Co.* v. *Water P. & C. Commission,* 267 N. Y. 265):

> * * * The petitioner [licensee] claims that by the acts of 1892, 1893 and 1896, it had a grant from the State to rights in the Niagara river of which it could not be divested by subsequent acts, and that it could withdraw 20,000 c. f. s. without paying for it. The answer is that the acts permitting the withdrawal of water were subject to the reserve power of the State to regulate and control the use in behalf of the public, and the privileges and rights granted to the power company were taken subject to this right of the State and also

[42] Cf. *Matter of Long Sault Development Co.*, 212 N. Y. 1, error dismissed, 242 U. S. 272, questioning the power of the State to abdicate state control over a navigable river.

> subject to the control of Congress. The power of Congress to regulate this river is unquestioned * * *. [at 276.]
>
> * * * * *
>
> There are other questions arising which we do not deem it necessary to consider, such, for instance, as the constitutionality of the acts of 1892 and 1893 and 1896 and further, the power of the State at any time to give away to private parties for commercial enterprises the sole use of navigable rivers or the diversion of the water therein. [at 279.] [43]

Thus, assuming that the water power rights involved here were "vested" under the laws of the State of New York, they were manifestly subject to such high degree of defeasibility that the term "vested" in its ordinary connotation cannot be applied to them.

Indeed, effective since 1943, the Company has been paying rent of $1,100,000 annually to the State of New York for these very rights. Sixteenth Annual Report of the New York Power Authority for the Year Ended December 31, 1946, Legis. Doc. (1947) No. 18, p. 46. In sustaining the exaction of rentals to the State, the New York Supreme Court destroyed the foundation for any claim of "riparian ownership" or "private

[43] See also *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. (N. Y.) 696, stressing that the legislative grants to respondent's predecessors in interest were revocable at the will of the legislature.

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usufructuary rights." *Niagara Falls Power Company* v. *Duryea,* 185 Misc. 696. For the State could not require rentals for water rights in private ownership; most certainly, that decision eviscerated the power of the lessor to prevent withdrawals by other parties.[44] See also Section 612 of the Conservation Law (McKinney's Consolidated Laws of New York, Book 10, 1951.)

To argue, as did the court below (R. 598),[45] that such an exaction of rent confirms the private right is completely out of line with reality. The fact of the matter is that under New York law the Company has no "vested right" in any normal sense of the term; to hold that such a tenuous

[44] Indeed, New York itself recognized that requiring the respondent to pay such rentals in fact passes the charges on primarily to the consumer. Thus, the Twelfth Annual Report of Power Authority of the State of New York for the Year Ended December 31, 1942, pp. 67–68, stated:

"Over short periods of time, to be sure, the inflexibility of the company's rates may preclude the company from shifting the burden of a newly imposed rental charge to the pocketbook of its consumers. Sooner or later, however, its effort to shift these rentals is almost sure to be successful. The State would, therefore, be deluding itself if it failed to recognize that any rentals which it may impose upon the Niagara Falls Power Company for the use of the State's water-power resources will ultimately come, not out of any excess profits of the company, but rather out of the consumers of electricity themselves."

[45] The court below recognized that the usufructuary right "is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor * * *" (R. 595), and that the state legislature might have preempted the entire flow.

interest comes ahead of the interests expressly protected by the Power Act is, clearly, to misconceive the nature of that Act.

B. CONGRESS COULD NOT HAVE INTENDED TO REQUIRE THE CONSUMER AND THE FEDERAL GOVERNMENT TO PAY FOR DEALINGS IN WATER POWER RIGHTS OF THE KIND INVOLVED IN THE INSTANT CASE

1. The origin of the rebate granted Niagara Lockport and Buffalo Niagara has been set forth in detail above (at pp. 6–7). It may be recapitulated briefly as follows: At the beginning of the century respondent's corporate predecessor leased the right to use 262.6 cubic feet of water to the Pettebone-Cataract Companies. The assets of these two corporations were acquired in 1925 by Niagara Lockport, respondent's affiliate. Niagara Lockport conveyed to respondent all the assets of the Pettebone-Cataract Companies except the water power rights. Those it leased to respondent in return for certain rate concessions. As the result of these complicated transactions among affiliates, the Pettebone-Cataract water "rights"—if still in existence—were carefully kept alive with a resulting reduction in respondent's income by $220,500 over the five-year period here involved.

2. The International Paper water rights had their inception in a number of leases and options granted by respondent's predecessor in interest to the predecessor of the Paper Company or the Paper Company itself. By 1919 the Paper Com-

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pany had thus acquired the right to divert 7,200 hp (the approximate equivalent of 730 c. f. s.) at a price of about $10 per annum for each horsepower. In 1919, when the enactment of the Federal Water Power Act was imminent, International Paper released and conditionally surrendered its lease to its lessor. Ordinarily, such surrender would terminate the lease by merging it with the fee.[46] In the instant case, however, the power lease was painstakingly kept alive and the relationship of lessor and lessee reversed. The landlord became the tenant of its own lessee and paid to it charges for the use of its own water. The rental first consisted of a rebate for power charges and later of an annual payment of $99,000, *i. e.*, more than International Paper had paid to Niagara Falls Power. Moreover, considering that International Paper has been released from its duty to pay rent to Niagara Falls Power, respondent now is paying to International Paper Co. more than twice the rate it used to charge its former tenant.

Assuming with the court below (R. 606) that these transactions were entered into at arms' length (but see *A. T. & T. Co.* v. *United States*, 299 U. S. 232, 239; *United States* v. *N. Y. Tel.*

[46] See *e. g.*, *Beall* v. *White*, 94 U. S. 382, 389; *Harris* v. *Hiscock*, 91 N. Y. 340. Moreover, the payments to International Paper Co. would be in the nature of a compensation for the surrender of the lease, *i. e.*, a capital expenditure, and properly disallowed as a current operating expense reducing income.

Co., 326 U. S. 638, 654)[47], they could scarcely be considered as binding upon the Federal Power Commission. For the respondent pays, as a result of these transactions, for only five percent of the water it uses. It has a direct and immediate interest in the preservation of its own claims to the other ninety-five percent. Accordingly, it was quite reasonable, so far as respondent was concerned (but cf. pp. 8–9, *supra*), for it to have accepted the claims of International Paper and of its parent to the private use of the Niagara River.

Indeed, these relations, which are necessarily based on the erroneous premise of the existence of private ownership of the waters of the

[47] The legislative history dealing with Section 10(d) and the related expropriation of excessive profits provision of Section 10(e) (Stat. App. 11) discloses that Congress was seriously concerned with the possibility that profits could be manipulated by dealings between parent and subsidiary. Cf. 59 Cong. Rec. 6524, 7724.

Further, the courts have uniformly sustained findings by the Federal Power Commission that expenses to a licensee which resulted in a profit to an affiliate are not of a legitimate nature. *Alabama Power Company* v. *McNinch*, 94 F. 2d 601, 608, 615, 618 (C. A. D. C.); *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2d 280, 284 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Co.* v. *Federal Power Commission*, 134 F. 2d 602, 609 (C. A. 5); *Puget Sound Power & Light Company* v. *Federal Power Commission*, 137 F. 2d 701, 703 (C. A. D. C.); *Niagara Falls Power Company* v. *Federal Power Commission*, 137 F. 2d 787, 793–794 (C. A. 2), certiorari denied, 320 U. S. 792; *Pennsylvania Power & Light Company* v. *Federal Power Commission*, 139 F. 2d 445, 450 (C. A. 3), certiorari denied, 321 U. S. 798.

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Niagara, are persuasive proof that Congress, in the Federal Water Power Act of 1920, could not have intended to force the consumer and the Federal Government to bear the added costs which such dealings engender.

C. CONGRESS INTENDED TO ABOLISH WATER POWER RIGHTS IN THE NIAGARA RIVER

If there were any doubt as to the meaning of the Federal Water Power Act of 1920, it would be readily resolved by an examination of the specific rights involved in this case. For Congress definitely indicated that it would not countenance the survival of the particular power rights here involved. During the years preceding the enactment of the Water Power Act of 1920, Congress was well aware of the diversion of water by respondent under state grants and indicated plainly that it considered those activities outright usurpations and that it did not consider itself bound by any privileges created under state grants.[48]

Congressional concern with the right to utilize the water power of Niagara Falls under state grants to divert water goes back at least to the Burton Act of June 29, 1906 (34 Stat. 626), which prohibited any diversion of water from the Niagara River unless authorized by a permit

[48] It will be remembered that the rights here involved do not constitute common law riparian rights owned by respondent's lessor but leases of portions of privileges received by respondent's corporate predecessors under state licenses.

revocable at will issued by the Secretary of War. The Burton Act and the licenses issued under it expired in 1913.

From 1913 until 1917 water was withdrawn from the Niagara River without any federal license in spite of the prohibition of the River and Harbor Act of 1899 (30 Stat. 1121).[49] In 1917, as the result of the war emergency, which required full utilization of all available water power, Congress passed a series of joint resolutions authorizing the Secretary of War to issue temporary and revocable licenses to respondent's corporate predecessors to divert water from the Niagara River.[50] The sponsor of these resolutions, which caused much indignant opposition, himself conceded that these companies were diverting the water without authority of law (54 Cong. Rec. 689, 704) but stated that this legislation, unfortunately, was imperative in view of the war and that he hoped that the time soon would come to bring the power companies at Niagara Falls to account (55 Cong. Rec. 4541). Significantly, the last two joint resolutions were cast in such a form that they and the licenses issued under them would expire on the effective day of

[49] *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 790 (C. A. 2), certiorari denied, 320 U. S. 792.

[50] January 19, 1917, 39 Stat. 867; June 30, 1917, 40 Stat. 241; June 29, 1918, 40 Stat. 633; July 12, 1919, 41 Stat. 163; cf. R. 457–471 for the texts of the resolutions and of the licenses issued thereunder.

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the legislation controlling the diversion of water from Niagara Falls. Hence, the enactment of the Federal Water Power Act operated as the revocation of the temporary revocable licenses under which respondent was operating,[51] just as the River and Harbor Act of 1909 (35 Stat. 815, 820; Stat. App. 52) [52] terminated the Chandler-Dunbar licenses. As we have shown throughout this brief (cf. pp. 33, 41–43, 47), Congress intended to assert its rights over Niagara Falls to the utmost,[53] leaving no room for the continued existence of any alleged private rights or state grants.[54] And, of course, if respondent's rights were to be disregarded, so would be the rights of its grantees.[55]

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[51] Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 790 (C. A. 2), certiorari denied, 320 U. S. 792.

[52] Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 56–57.

[53] See also Learned Hand's holding in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 791 (C. A. 2), certiorari denied, 320 U. S. 792, that the congressional debate and the specific references to respondent were "unequivocal assertions that the petitioner's [respondent here] existing rights would not be recognized."

[54] *Supra*, pp. 25–43.

[55] The International Boundary Waters Treaty of 1910 (36 Stat. 2448, 2450), relied upon by the court below (R. 602–603) was, of course, an agreement between the United States and Canada and did not relate to the question as to whether federal or state laws should control the diversions allowed in the United States. Cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, *supra*, at 790.

III

THE FEDERAL POWER COMMISSION PROPERLY DISALLOWED THE PAYMENTS AS ILLEGITIMATE OPERATING EXPENSES

In computing excess earnings the Commission must prevent the inflation of cost. *Alabama Power Co.* v. *McNinch,* 94 F. 2d 601, 618 (C. A. D. C.). Hence, it is not bound by the circumstance that the licensee actually made an expenditure (or failed to collect potential income) but may disregard any cost item which, although incurred, is not of a legitimate nature. *Alabama Power Co.* v. *McNinch, supra; Northern States Power Co.* v. *Federal Power Commission,* 118 F. 2d 141, 143 (C. A. 7); *Alabama Power Company* v. *Federal Power Commission,* 128 F. 2d 280, 291 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Alabama Power Company* v. *Federal Power Commission,* 136 F. 2d 929, 931 (C. A. 5). In the instant case the Commission held that the payment of rentals (or the grant of rebates) for these water power rights does not constitute a legitimate charge against income.

For the reasons we have detailed above, this decision was obviously correct. The short of the matter is that private water power rights were not preserved by the Act. Further, the payments here in question are for water rights in the Niagara River which Congress expressly refused to confirm. Even under New York law, their valid-

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ity is extremely doubtful. Accordingly, even if it were to be held that the Federal Water Power Act of 1920 did not abolish "vested" water power rights, the rights in question still could not stand, for the purposes of the Act. The Commission acted well within its statutory authority in disallowing the payments in question.

Moreover, even assuming that the rights had validity for some purposes, they retained no assessable value against the Federal Power Commission and the Federal Government.[56] That the respondent might have been under a legal obligation to make payments to the third party (and for the reasons discussed, we think there is no such obligation) does not make it mandatory for the Commission to recognize the expense as a "legitimate one" within the meaning of the Act. There need be no symmetry of legal relations between a regulatory body and its licensee on the one hand, and the licensee and third persons on the other. That a licensee who complies with an order of a regulatory body may thereby incur a legal liability to a third party, does not render the order of the agency less valid. *Board of Regents* v. *Carroll,* 338 U. S. 586, 601–603.

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[56] See *Appalachian Power* (311 U. S. at 427):

"It has been shown * * * that there is no private property in the flow of the stream. *This has no assessable value* to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined for fast land; nothing for the water power." [Italics added.]

In fact, this Court, in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359, dealing with the power-site value of land condemned under State law, expressly pointed out the difference in the relationships between, on the one hand, private parties, and, on the other hand, between the United States or its licensee and a private party. See 335 U. S. at 373. Accordingly, it is our position that no matter what the legal incidents of the contracts as between respondent and International Paper and Buffalo Niagara might be, those transactions are not effective as against the United States and the Federal Power Commission.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the order of the Commission be affirmed without modification.

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SEPTEMBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION ON BRIEF AMICUS CURIAE FOR THE STATE OF NEW YORK

In its brief *amicus curiae* the State of New York submits to this Court its conclusions (p. 51) that in the determination of this proceeding the Court (1) "should hold that the Niagara Mohawk Power Corporation has acquired no proprietary rights in the waters of the Niagara River under the laws of the State of New York," and (2) "should further hold that the proprietary rights of the State of New York in the waters of the Niagara River have not been superseded by Act of Congress."

278224—53

In the Supreme Court of the United States

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278224—53

1. On the first issue, the position of the Federal Power Commission, that the rights of the respondent under New York law are highly attenuated (Br. 49–54)—far from being an "attempted slander of title" (Resp. Br. 18)—apparently did not go far enough. For the State has persuasively show, with a wealth of authority,[1] that under New York law the respondent has no right to the power use of the Niagara River.

2. On the second issue, it is clear that the State has done no more than to reargue in this case the very contentions which were rejected by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, and *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152.[2] Indeed, it is highly significant that, with the exception of a passing reference (p. 37) to the *First Iowa Coop.* case, the State has ignored the interpretations of the Federal Power Act which this Court carefully reached, after a thorough review of all the relevant materials, in those cases. It is not the function of this Memorandum to rehearse again the legislative history and sectional

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[1] See, especially, *Niagara Falls P. Co.* v. *Water P. & C. Commission*, 267 N. Y. 265, and *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. (N. Y.) 696 (*amicus curiae* brief 49–50).

[2] See also *State of Iowa* v. *Federal Power Commission*, 178 F. 2d 421 (C. A. 8), certiorari denied, 339 U. S. 979; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C. A. 2), certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

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analysis of the Act, which this Court has clearly and completely set forth on more than one occasion. We shall merely present what we conceive to be the State's fundamental theory, and show how that theory has been explicitly rejected by this Court.

The State maintains that "The Federal Water Power Act of 1920 was in form not an original act but an amendment of the General Dam Act of 1910," and that "The Act, therefore, did not make a substantial departure from previous congressional policy and administrative practice." (Br. 27, 28.) This claim is, of course, completely unsupportable in the light of this Court's square holding that the Act "was a major undertaking involving a major change of national policy." *First Iowa Coop., supra,* at 180; and see *New Jersey* v. *Sargent,* 269 U. S. 328, 334–337; *United States* v. *Appalachian Power Co., supra,* at 423–424, 427; *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 23.[3]

[3] In like manner, to say, as does the State (Br. 36), that "on almost every amendment the conservationists led by Senator Lenroot were defeated and that the group led by Senator Nelson generally succeeded in retaining its amendments in conference with the House," is to ignore the careful analysis of that history by this Court and the conclusion that the Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Coop., supra,* at 180.

Moreover, essential to the State's argument, and a necessary consequence of its position are its contentions that (Br. 2, 23) the "Federal Power Commission cannot license private corporations to use [the waters of the Niagara] without the consent of the state," and that (Br. 42) "No doubt the preservation of local rights gives rise to inconvenience of administration and division of authority. That is a penalty of the federal system." The Supremacy Clause of the Constitution aside, it is indisputable that if the *First Iowa Coop.* case decided anything, it decided that the Federal Power Act had avoided just that conflict. We can do no better than to quote from that opinion on these issues of the supposed conflict of jurisdiction and of the alleged necessity for a licensee to receive prior state approval before it can use its federal license.

* * * * *

> * * * This [solution] has resulted in a dual system involving the close integration of these powers [those of the State and Federal Governments] rather than a dual system of futile duplication of two authorities over the same subject matter. [328 U. S. at 171.]

* * * * *

> * * * The resulting integration of the respective jurisdiction of the State and Federal Governments is illustrated by the careful preservation of the separate in-

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> terests of the States throughout the Act, without setting up a divided authority over any one subject. [*Id.* at 174.]
>
> * * * * *
>
> [Section 27] therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course. [*Id.* at 176.]
>
> * * * * *
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * * [*Id.* at 181.]

In sum, it is clear that the State's argument proceeds upon a premise which this Court has decisively rejected.

3. The memorandum of respondent regarding the *amicus curiae* brief suggests (p. 7) that the State is here asserting claims at the eleventh hour, thus intimating some new position now taken by the State. But, in view of the lower court's holding that the respondent has water power rights which are valid under State law, the *amicus* brief merely sets forth the traditional position of the State in an attempt to dissuade

this Court from affirmance of that holding. Neither the State nor the Federal Power Commission regards the contested water power rights here as valid proprietary rights under the laws of the State.

On the other hand, the State has intimated that the Federal Power Commission took a different position in 1923. Although the quoted excerpts from the Public Papers of Governor Alfred E. Smith (Br. 15–17) do not support this suggestion, it is quite clear that the Federal Power Commission has at no time indicated that the rights of the respondent's lessors were to be recognized. The short of both these matters is that this is the first occasion, insofar as the Federal Power Commission is concerned, for definitive court adjudication of the validity of these alleged rights.

The license issued March 2, 1921, for the Niagara Falls project did not include either the Pettebone-Cataract or International Paper Company alleged water power rights here in question, as admitted by the licensee in 1947, when it sought amendment of the license to include the Pettebone-Cataract water rights expressly (R. 257, 306).[4] Article 13 of the license, for which the 1947 amendment was sought, did not include, but only referred to these rights, "if any" (R. 384).

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[4] Licensee started utilizing the so-called Pettebone-Cataract water in 1925 upon completion of new project facilities authorized by Article 7 of the license (R. 384).

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And the Commission's order of November 21, 1947, refused the amendment on the express ground that the Pettebone-Cataract interests had no rights which could be asserted against the licensee (R. 387).

Prior to 1947 there was no occasion for the Commission to question these water rights as it did in its order of September 27, 1950, here under review. This order required the respondent to set aside in an amortization reserve half of its excess earnings as required by Section 10 (d) of the Federal Power Act. During the first twenty years of operation under the license (March 1921 to March 1941), the amortization reserve provisions of Section 10 (d) of the Federal Power Act were not operative. In the interim between March 1941, the start of the amortization period, and March 1948, it was necessary to allow a period of experience to elapse in order for the licensee and the Commission to know whether the licensee had excess earnings, a portion of which should be set aside in the amortization reserve as required by Section 10 (d) of the Federal Power Act.

In this interim period the Commission determined the original cost of the project, without which excess earnings could not be determined, and the licensee challenged the validity of the Commission's findings and order requiring the cost figure to be shown on the project books of

account. The Commission's order was affirmed by the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787, certiorari and rehearing denied, 320 U. S. 792, 815. The first amortization reserve show cause order of the Commission directed against the licensee at Niagara Falls was issued March 16, 1948, and was superseded by a similar order issued March 15, 1949 (R. 53), which resulted in the present proceeding. The order under review covers the period from March 1941 through the calendar year 1946.

To summarize: the Commission put the respondent (and the State) upon notice in 1921 that at that time the Commission was not passing upon the validity of the rights in question within the meaning of the Federal Water Power Act, but, as the licensee stated in 1947, excluded those rights from the license; the Commission acted promptly the first time the issue was squarely put before it by the 1947 application for an amendment of the license; and the Commission acted within a reasonable time in computing the amortization reserve under Section 10 (d). There is no justification for any suggestion that, insofar as the respondent's rights to the Niagara River are concerned, either the State or the respondent

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has been misled by any action of the Federal Power Commission.[5]

Respectfully submitted.

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Federal Power Commission.

OCTOBER, 1953.

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[5] The State also attempts to suggest (Br. 40–41), that the position taken herein is inconsistent with the position taken by the Solicitor General in matters arising out of the *United States* v. *California* litigation (332 U. S. 19). It is manifest, from the very citations relied upon by the State, that there is no such inconsistency, and that the problem presented by this case is not related to those involved in that litigation.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~691~~ 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL POWER COMMISSION, *Petitioner,* v. NIAGARA MOHAWK POWER CORPORATION, *Respondent.*	No. 691

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is reported in 202 F. 2d 190; the Commission's (R. 105) appears in 9 F. P. C. 228.

Jurisdiction

The order of the Court of Appeals was entered December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. § 1254 (1).

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The order of the Court of Appeals was entered December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. § 1254 (1).

Questions Presented

1. Did the Federal Power Act abolish private proprietary rights to use waters from a navigable river?

2. Is the Federal Power Commission empowered to disregard arbitrarily payments made and obligations incurred by a licensee pursuant to long-standing contracts made at arm's length in acquiring water rights existing long prior to the passage of the Federal Power Act?

Statutes Involved

The statutes involved are adequately set forth in the Appendix to the Petition.

Statement

The Petition squarely raises the effect of the Federal Power Act on water rights validly existing under state law. The validity of the "International Paper Company rights" has been recognized by this Court in *International Paper Company* v. *U. S.*, 282 U. S. 399, and the "Pettebone-Cataract rights" by the courts of New York.

The fundamental error of the Petition lies in construing a regulatory statute as a confiscatory enactment.

Summary of Argument

1. The decision below is in accord with well recognized long standing principles laid down by this Court. The court

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below decided no question left open in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373, in a manner inconsistent with the interpretation of the Act in prior decisions of this Court. Nor is the decision below in substantial conflict with "the reasoning"—and certainly not with the decision—of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, cert. denied 320 U. S. 792, rehearing denied 320 U. S. 815. Moreover, even if such a conflict in "reasoning" existed, it would be of no moment in view of Rule 38(5) (b) of this Court which sets forth, as a possible ground for granting certiorari, a conflict between "decisions" of the Courts of Appeals. Surely this Court will not concern itself with composing the different facets of reasoning among Courts of Appeals in the absence of a conflict between decisions. Furthermore, the language in *Niagara Falls* relied on by Petitioner is no more than *dictum*.

2. The court below correctly rejected a contention that the Federal Power Act abolished all private proprietary rights to use water from a navigable river for power purposes. The express terms of the Act itself, its legislative history, and the authorities construing it demonstrate beyond cavil that the Act was designed as a regulatory measure—to control but not to confiscate. The Act, while protecting the public interest by regulation, was also designed to encourage private investment in water power development; and to this end the Act recognizes the existence and validity of private water rights, simply subjecting such rights to the condition that their use for power purposes be subject to license by a regulatory commission.

Argument

We join issue with the contentions that private parties are not authorized under the Act to own water rights (Pet. Br. 13), that the United States has "the exclusive proprietary interest" in a navigable stream (Pet. Br. 14) and "the complete ownership" of its flow (Pet. Br. 15), that the Act effectively abolished private rights to use waters from a navigable stream (Pet. Br. 16, 23, 28) and that the United States is "concededly the ultimate owner of all water rights in navigable streams" (Pet. Br. 28). All these propositions we deny.

As background for our argument, we stand on the following propositions correctly decided by the court below. The water rights in question do not rest upon a claim of ownership of the running waters of the Niagara River, but rather upon a usufructuary property right recognized at common law and confirmed by judicial decisions (R. 594). The question whether the New York corporations here involved have a usufructuary right in the waters of the Niagara River depends upon New York law (R. 595). Under New York law a riparian owner's right to use the waters of a stream for power purposes is a part of his estate and a corporeal hereditament (R. 595). The courts of New York have upheld the validity of the Pettebone-Cataract rights in *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.,* 198 App. Div. 644 (R. 597); and the validity of the International Paper water rights under state law has been recognized by this Court in *International Paper Co.* v. *U. S.,* 282 U. S. 399 (R. 597). It follows that the Pettebone-Cataract and the International Paper water rights are valid under the law of New York (R. 600). We do not understand that Petitioner here questions these propositions.

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Petitioner argues that Congress by the Act "and its predecessor statutes asserted its dominant authority" (Pet. Br. 9-10) over navigable waters of the United States so as to wipe out all private water rights valid under state law. We admit the existence of Congressional authority over navigable waters and that the Act delegated to the Commission regulatory powers over the use of private water rights for power purposes. But we strenuously deny that the Act abolished all private water rights.

Control, not confiscation, is the keynote of the Act. As this Court recently said, the objective of the Act was "the creation of a commission with functions and powers comparable to those of the Interstate Commerce Commission in the field of transportation." *U. S. ex rel. Chapman* v. *Federal Power Commission, et al.*, Nos. 28 and 29, this Term, decided March 16, 1953, slip opinion, p. 15. See also the statements as to the purposes of the Act in *Grand River Dam Authority* v. *Grand-Hydro, supra,* at 372, and in *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, 171. Would Petitioner have it that the Interstate Commerce Act wiped out all private rights in property used for railroad purposes? To ask the question is to point its absurdity; yet that would be the analogue of Petitioner's position here.

The views of this Court, in recognizing the regulatory character of the Act, were correctly applied by the court below. That court observed that much of the difficulty in this case arose from a misconception of the Act, and characterized the Act as "purely a regulatory measure. A Federal license is not an original grant of authority but a permission to use a state's grant of authority" (R. 607). When state regulation conflicts with lawful Federal regulatory

action, state authority must yield to Federal, as held in *First Iowa*; but it by no means follows that the Act and a license thereunder constitute the source from which all water rights flow (R. 607).

The soundness of these judicial views is emphasized by the provisions of the Act itself. Read as a whole, it discloses an intent to provide a comprehensive scheme of Federal regulation governing the use of water rights for power purposes. But, at the same time, it repeatedly recognizes the existence of water rights rather than proclaiming their non-existence, which would be the case had the Act been designed to abolish them.[1] Indeed, the license constitutes merely a certificate that the exercise of water rights—valid under state law—does not interfere with legitimate Fed-

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[1]Section 3(11) defines "project" as including "water rights".

Section 4(b) empowers the Commission, in determining original cost of and net investment in a project, to require licensees to file a statement showing "the price paid for water rights" as well as lands and interests therein.

Section 9(b) requires that each applicant for a license submit evidence that it has complied with the requirements of state law "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes".

Under Section 14 it is provided that for purposes of determination of the amount to be paid by the United States in the event of taking over of a licensed project after the expiration of the license, "the values allowed for water rights * * *" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee"—thus evidencing a clear intendment that the payment then to be made shall allow a value for water rights.

Again, Section 21 provides that when any licensee can not acquire by contract the property of others necessary to a power project, it may acquire the same by the exercise of the right of eminent domain—thus recognizing the necessity of a licensee acquiring adverse property rights such as water rights, by condemnation (which imports compensatory payment) if not by contract.

Finally, Section 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

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eral purposes, as the court below correctly observed (R. 607).

This Court has expressly held that the Act was not intended to interfere with the validity of water rights existing under the law of New York, and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377-9.

The regulatory character of the Act distinguishes it entirely from the type of statute involved in *U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53, on which Petitioner relies. That statute specifically asserted that the ownership in fee simple absolute by the United States of certain property was necessary for the purposes of navigation (R. 600) —a legitimate Federal purpose. In contrast, the Federal Power Act is bare of any such assertion; rather, it "expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies". *U. S. ex rel Chapman* v. *Federal Power Commission, et al., supra,* at p. 15. The essential difference between the character of the statutes was properly stressed by the court below as the basis for its conclusion that *Chandler-Dunbar* is not authority for the Commission's position (R. 602).[2]

None of the cases cited by Petitioner at pages 14-15 detracts from the foregoing analysis. *Lewis Blue Point Oyster, Chicago etc. R. Co., Commodore Park* and *Willow*

[2]Congress knew of the *Chandler-Dunbar* situation at the time of its debates on the Act, and the managers of the bill were at pains to assure their colleagues that the bill was not designed to accomplish a specific taking as was the statute in *Chandler-Dunbar*. (59 Cong. Rec. 1040, 1431).

River all involved takings of a riparian owner's property by the United States acting in the specific exercise of its power to improve navigable waters; and *Sargent* in fact supports our view by acknowledging that the Act recognizes pre-existing water rights (269 U. S. at 338-9). *Appalachian Power* did not overrule *Ford,* as Petitioner implies at page 14, for subsequent to *Appalachian Power,* this Court expressly cited *Ford* with approval in *U. S.* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 734. Finally, this Court's recent opinion in *U. S. ex rel. Chapman* v. *Federal Power Commission, et al., supra,* confirms Respondent's position; Petitioner's reliance on the dissent there can carry no weight against the clear holding of the majority.

Despite the evident regulatory character of the Act, Petitioner advances the extraordinary contention that nothing in the Act indicates that private water rights in navigable waters were to be recognized by the Commission (Pet. Br. 16), and that it would require clear and unequivocal language in the statute to warrant holding that water rights used for power purposes were among the rights "saved" by the Act (Pet. Br. 23). To the contrary, we assert that there should never be imputed to Congress so drastic a step as abolishing all private water rights, country wide, in the absence of plain and unmistakable Congressional intent evidenced in the language of the statute or in its legislative background, or both. The fact is that this regulatory Act abolished no rights; therefore, there is no need for any language designed to save rights.

Nevertheless, Petitioner's misconception of the Act as confiscatory leads Petitioner to view as crucial Section 27 of the Act which reads:

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> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

On the basis of certain language in this Court's opinion in *First Iowa,* Petitioner asserts that the words "other uses" in Section 27 must be confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes (Pet. Br. 18). *First Iowa* merely held that when a state law as to the form of a power development conflicts with the Act, state law must yield to Federal; and it was only in this context—the clash of state and Federal regulation—that the Court had occasion to consider Section 27. *First Iowa* presented no issue as to the effect of the Act on the existence of property rights to use water; indeed, this Court recognized that the regulatory nature of the Act still left to the states their constitutional jurisdiction over such questions as the sufficiency of the legal title of an applicant to its property rights. 328 U. S. at 174, 178.

Moreover, Petitioner's misconstruction of Section 27 would make a strait jacket of its terms, by arbitrarily applying the rule of *ejusdem generis* and so subverting Congressional intent underlying the Act. That so-called rule is no more than a canon of construction to be resorted to in the absence of other evidence as to the meaning intended. Particularly, it should never be invoked to subvert the intention of the legislature. *U. S.* v. *Alpers,* 338

U. S. 680, 682; *Texas* v. *U. S.*, 292 U. S. 522, 534; *Mason* v. *U. S.*, 260 U. S. 545, 554; *Danciger* v. *Cooley*, 248 U. S. 319, 326.

Furthermore, where the literal words would bring about an end completely at variance with the purpose of a statute, the judiciary may properly use the legislative history to reach a conclusion. *U. S.* v. *The Public Utilities Commission of California, et al.*, Nos. 205 and 206, this Term, decided April 6, 1953, slip opinion, p. 19. The legislative background of the Act demonstrates a clear Congressional intent of "encouraging private enterprise and the investment of private capital" in power projects, consistent with the public interest. H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 3 (1919); Sen. Rep. 180, 66th Cong., 1st Sess., *passim* (1919). In reliance on this Congressional purpose, many millions of dollars have been invested in property used for power purposes, including water rights. That the Act was not intended to disturb such rights was emphasized by Representative LaFollette, a member of the House Committee on Water Power which reported the bill. He asserted that the bill only allowed the Commission a supervisory power over those functions entirely within the states' jurisdiction, and that the bill was not designed to infringe any of the property rights of the states as to the bed and banks and to diversions of waters or any of the states' rules of property (56 Cong. Rec. 9109, 9810).

Indeed, diligent research into the extensive legislative background of the bill has failed to unearth any evidence that Congress intended the statute as a confiscatory measure designed to abolish with one sweep private water rights throughout the country. Had such a purpose been intended, would there not have been full debate of this issue in Con-

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gress and extensive hearings in Committee? Petitioner's construction of the Act cannot be assumed by innuendo, especially "in view of the dearth of legislative discussion of the matter." See *U. S.* v. *The Public Utilities Commission of California, supra,* at p. 14. This dearth is doubtless explained by the provisions of Section 9(b) of the Act conditioning the issuance of a license upon a showing that the applicant has complied with the requirements of state law with respect to the use of water for power purposes.

Moreover, Congressional history reveals that Section 27 appears to have been added as a disclaimer in the excess of caution often displayed by lawyers and lawmakers. Representative Taylor, a member of the House Committee on Water Power, was responsible for the addition of Section 27 to the Act (56 Cong. Rec. 9115). Of Section 27 he commented:

> "That section not only recognizes and protects our plain constitutional vested water rights, but it is fair and honest, * * *" (56 Cong. Rec. 9912).

And later:

> "This special water power committee feel that where people now have legally recognized rights of various kinds, we did not want to rip them up.
>
> * * * * *
>
> That is one of the things that all of the western Members have earnestly and jealously guarded against—not to legislate a man out of his existing

> rights, either in agricultural claims or water rights or coal or oil * * *." (56 Cong. Rec. 10033-4).[3]

Thus the Act and its background demonstrate beyond peradventure the Congressional design to formulate a system of Federal regulation over the use of water for power purposes. This is far short of Petitioner's view that the Act wiped out all private water rights by Sections 1 through 26, except those expressly "saved" by Section 27.

The decision of the court below correctly interpreted the Act as an instrument of control, not of confiscation. The court went to the heart of the matter when it referred to the Commission's misconception of the Act (R. 607), a misconception repeated in Petitioner's brief. And the court correctly disposed of Petitioner's reliance on *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787,

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[3]And see the following remarks by Representative Mondell during the Congressional hearings:

> "This act should contain * * * some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water'. * * *
>
> That is simply a statement of facts. It is not a new law. It is simply a recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things." (Hearings before House Committee on Water Power, 65th Cong., 2nd Sess. pp. 619-20).

After Section 27 was appended to the bill, Representative Mondell remarked:

> "I am glad the provision the gentleman [Representative Taylor] urged, and which I also urged in my hearing before the committee, is in the bill. It is highly important, and yet the gentleman knows that it is simply a declaration of fact; it is simply the recognition of a fact; but it is important to have it in the bill." (56 Cong. Rec. 9115).

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cert. denied 320 U. S. 792, rehearing denied 320 U. S. 815. That case decided only that Section 23(a) of the Act, in providing for a fair value license for projects operated under a permit existing at the date the Act became effective, had application only to projects then operating under continuing Federal permit; and that the Power Company had no such permit and therefore was not entitled to a fair value license. The "reasoning" in that case relied on in Petitioner's brief was in fact, as the court below correctly held, not necessary to the decision and premised on the erroneous assumption that the International Boundary Waters Treaty of 1910 had the effect of destroying all diversionary water rights under New York law and converting the United States into the fountainhead of any subsequent private right to use the amount of water allotted to the United States by the Treaty (R. 606-7). Petitioner in this Court expressly disavows the Second Circuit's analysis of the Treaty, deleting all reference to the Treaty from the quotation from the Second Circuit's opinion (Pet. Br. 24-5) and claiming that the Treaty has no relevance (Pet. Br. fn. 17). But the Treaty was an essential ingredient in the reasoning of the Second Circuit; and by rejecting the Treaty here, Petitioner rejects the fundamental basis of the "reasoning" of the Second Circuit.

In closing, Petitioner attempts a distinction between the relationship of the Commission to a licensee and of a licensee to private parties (Pet. Br. 25-28). But the attempted distinction evades the fundamental point at issue: the only basis in law for disallowing Respondent's payments for water rights must be that all such rights were abolished by the Act. *Regents of the University System of Georgia* v. *Carroll,* 338 U. S. 586, has no bearing, because it presented

no question of abolishing rights between a licensee and a regulatory agency. There this Court held that the Federal Communications Commission had no authority to determine the validity of a contract between a licensee and a third party; and that therefore the fact that the Commission had required disaffirmance of such a contract, as a condition to the grant of a license, did not constitute a defense in an action for breach of the contract against the licensee. The case does not support Petitioner's alleged power to arbitrarily require Respondent to disaffirm its long standing contracts since in *Regents* this Court expressly assumed the validity of the action of the regulatory Commission, the very point at issue here.

In any event, whatever comfort Petitioner attempts to derive from *Regents* is short lived, for immediately thereafter its argument reverts to its favorite contention that the United States is the ultimate owner of all water rights, and that the court below in recognizing the existence of private water rights failed to follow the "principles" purportedly set forth by this Court in *Chandler-Dunbar* (Pet. Br. 28-9). However, no amount of strained argument can obscure the fundamental proposition that the Act is a measure of control, not confiscation.

Thus the court below decided no question left open in *Grand River Dam Authority* v. *Grand-Hydro, supra,* in a manner inconsistent with the interpretation of the Act in prior decisions of this Court. Petitioner's attempt to invoke the dissent there (Pet. Br. 26-7) is as misguided as its endeavor to call up the dissent in *U. S. ex rel Chapman* v. *Federal Power Commission et al., supra* (Pet. Br. 15). As shown above, the decision of the court below properly interprets the statute as a regulatory measure,

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and this interpretation is consistent both with prior decisions of this Court and with the Congressional purpose underlying the Act.

Finally, as to Petitioner's apparent attempt to show that the decision below will prejudice the interests of the United States (Pet. Br. 11-13). The argument is erroneous to the extent that it asserts that the Federal Power Commission fixes rates charged by the licensee, for those are fixed by the New York State Public Service Commission and Section 19 of the Act expressly denies to the Federal Power Commission jurisdiction over such matters. But more important, Petitioner's theory of abolishment is totally inconsistent with the Congressional intent of encouraging private investment. For if Petitioner's theory were to prevail, "original cost" and "net investment" would be reduced because the dollar values of water rights would be eliminated, and hence the capital value of the project property of many licensees would be slashed. Also it is clear that to the extent that Respondent would be required to transfer sums to amortization reserve account, Respondent's surplus and its earnings available for dividends and other corporate purposes would be correspondingly reduced; and if the United States were to exercise its right to take over licensee's project at the expiration of its license, the amount received at that time by Respondent and those who had invested in its project would be correspondingly reduced. These adverse effects, scarcely designed to further the Congressional intent of encouraging private investment in power projects, are the necessary consequence of Petitioner's position.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 1953.

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OCT 8 1953
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL POWER COMMISSION, *Petitioner,* v. NIAGARA MOHAWK POWER CORPORATION, *Respondent.*	No. 28.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is reported in 202 F. 2d 190; the Commission's (R. 105) appears in 9 FPC 228.

Jurisdiction

The order of the Court of Appeals was entered December 31, 1952 (R. 614). The Petition for Certiorari was filed March 30, 1953, and was granted on May 18, 1953 (R. 617). The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. §1254(1).

Questions Presented

1. Did the Federal Water Power Act of 1920 abolish private proprietary rights to use waters from a navigable river?

2. Is the Federal Power Commission empowered to disregard arbitrarily payments made and obligations incurred by a licensee pursuant to long-standing contracts made at arm's length in acquiring water rights existing long prior to the passage of the Federal Water Power Act of 1920?

Statutes Involved

The statutes involved are adequately set forth in the Transcript of Record and in the Statutory Appendix.

Statement

This case directly raises the effect of the Federal Water Power Act of 1920, now Part I of the Federal Power Act (the Act), on water rights validly existing under state law. The Commission's order under review was made in a proceeding to determine amortization reserve liability of a licensee under Section 10(d) of the Act (R. 395-6). The order determined that Respondent,[1] as a licensee under the Act of Project No. 16 at Niagara Falls, New York, is required to accrue $914,432.04 to amortization reserve account as one-half of its surplus earnings from normal operations for the period March 2, 1941 to December 31, 1946, inclusive (R. 116), instead of $515,432.04 agreed to by Respondent (R. 7).

To the extent that amounts are transferred from time to time to amortization reserve account, Respondent's surplus and its earnings available for dividends and other corporate purposes are correspondingly reduced. In the event that the United States takes over the licensed

[1] Respondent is successor by merger, effected October 19, 1950, to The Niagara Falls Power Company, the original licensee under the license for Project No. 16 at Niagara Falls. Chart A showing Respondent's principal predecessors in title referred to herein appears at page 67.

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project at the expiration of the license, pursuant to Section 14 of the Act, the amortization reserve may be deducted from the original cost of the project in determining the amount to be paid to Respondent.

In arriving at its determination the Commission disallowed as operating expenses of Respondent its past payments of $99,000 per year to International Paper Company (R. 115), such payments being required by a long-standing contract whereby International Paper Company conveyed to Respondent by defeasible grant certain rights to use water,—called the International Paper Company rights.

Also, the Commission artificially increased Respondent's project revenues for those years—above the amounts actually received by Respondent—by disregarding Respondent's long-standing contractual obligation to provide electric energy to another company at cost as consideration for the lease by that company to Respondent of certain rights to use water,—called the Pettebone-Cataract rights (R. 114-5).

A. Historical background.

Respondent's remote predecessors in hydraulic power development at Niagara Falls acquired lands riparian to the Niagara River extending above and below the Falls, and constructed a hydraulic canal completed in 1861 which tapped the River nearly a mile above the Falls and conveyed water to a canal basin on the High Bank of the River approximately one-half mile below the Falls[2]. Later, Respondent's predecessor The Niagara Falls Power Company constructed another intake canal above the Falls extending only a short distance inland and a tunnel from a point under that canal and under the City of

[2] The photograph at R. 311 shows the hydraulic canal extending diagonally to the canal basin near the upper right corner.

Niagara Falls to the River below the Falls[3]. The proprietors of these canals conveyed various mill sites to others with rights to use water from the canals for generating power. The general method of power development at that time was to sink pits under the mills, and to use water from the canals to drive turbines at the bottom of the pits. Water from the hydraulic canal used by mill owners escaped from the pits through tunnels to the face of the High Bank and thence back into the River (R. 311-12, 475-6). The water used from the intake canal escaped through a short tunnel into the main discharge tunnel of the Power Company and thence back into the River (R. 491). Thus in the end no water was lost from the flow of the River.

B. The International Paper Company Rights.[4]

These rights had their genesis in 1891 when Respondent's predecessor The Niagara Falls Power Company leased and later conveyed to a predecessor in title of International Paper Company land on the bank of the Niagara River adjacent to the Power Company's intake canal, together with the right to take and use a limited amount of water from that canal or from the River. The various deeds and agreements defining this water right are fully set forth in the Record (R. 168-219) and are well summarized in the opinion below (R. 588-9). Suffice it to say here that this Court has characterized this water right of the Paper Company as "a right that by the law of New York was a corporeal hereditament and real estate." *International Paper Company v. United States*, 282 U. S. 399, 405 (1931).

[3] The drawing at R. 491 shows this intake canal and tunnel.

[4] Chart B showing the descent of these rights appears at page 68.

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By agreement in 1919, as amended in 1937, the Paper Company has conditionally granted and released to Respondent this right to take and use 730 cubic feet per second (cfs) of water, and Respondent has agreed to furnish to the Paper Company a specific amount of electric energy and to make annual payments by way of rental value for the water (R. 220, 240). But the grant is conditioned upon the continuance of the supply of the specified amount of electric energy by Respondent; if that fails for a period of ninety days, the Paper Company has the option to revive its right to take and use 730 cfs of water. Respondent paid the Paper Company for the use of this water $99,000 per year during the period from March 1941 through December 1946 and it is these payments that the Commission has now disallowed on the erroneous theory that the Paper Company rights no longer exist.

C. The Pettebone-Cataract Rights.[5]

Prior to 1879 predecessors in title of The Pettebone-Cataract Paper Company and the Cataract City Milling Company (the Pettebone-Cataract companies) acquired from Respondent's predecessors certain mill sites on the High Bank of the Niagara River below the Falls adjacent to the hydraulic canal, together with rights to use limited amounts of water from that canal for the generation of power (R. 294). In 1900 those companies and the proprietor of the hydraulic canal by contract fixed the amount of water to which the Pettebone-Cataract companies were entitled at 262.6 cfs at a head of 100 feet (R. 320-1, 333-5). This was only a partial head, as the canal basin was about 215 feet above the river level; so the canal owners reserved the right to enter on the Pettebone-Cataract lands and construct a tunnel within the

[5] Chart C showing the descent of these rights appears at page 69.

High Bank to collect the water discharged by those companies and utilize it through the remaining 115 feet of fall.

It was not until 1914 that the proprietor of the canal took steps to construct this tunnel. The Pettebone-Cataract companies refused to permit such construction, as a result of which a suit was brought to enjoin them from interfering. The New York courts upheld the right of the canal owners to construct upon the Pettebone-Cataract lands facilities necessary to utilize the remaining head and awarded damages of approximately $172,000 against the Pettebone-Cataract companies for their breach of the 1900 contract. *Hydraulic Power Company* v. *Pettebone Cataract Paper Company,* 112 Misc. 528 (1920), *affirmed,* 198 App. Div. 644 (1921) (R. 317-36). In that litigation the Appellate Court recognized and affirmed the validity of the Pettebone-Cataract rights to utilize water from the canal basin (R. 332).

While that litigation was in progress, the Federal Water Power Act was enacted on June 10, 1920. The Niagara Falls Power Company, then owner of the canals, applied for a license thereunder and set forth the construction necessary to utilize the outfall of the turbines of the Pettebone-Cataract companies through the remaining head of 115 feet (R. 337-9, 340-7, 349, 350). During the pendency of the appeal in the litigation between the Power Company and the Pettebone-Cataract companies, the Federal Power Commission in 1921 issued to the former the Project No. 16 license which is here involved. The license contained the following:

> "13. In the event that the United States or a new licensee shall take over the project of the licensee pursuant to the provisions of the Act,
>
> * * * * *
>
> Such taking over of the project shall also be subject to the rights, if any, of Pettebone-Cataract

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> Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the rights, if any, of International Paper Company." (R. 384)

The Pettebone-Cataract companies continued to divert and use water from the hydraulic canal through the fall of 100 feet for the production of power until 1925, four years after the Project No. 16 license was issued.

In 1925 the properties of the Pettebone-Cataract companies, including lands, buildings, machinery and water rights, were sold to Niagara Lockport and Ontario Power Company. As consideration therefor, Niagara Lockport assumed the judgment debt of about $172,000 owed to The Niagara Falls Power Company by the Pettebone-Cataract companies (R. 273) and issued to the Pettebone-Cataract companies $700,000 par value of its 7% Preferred Stock (R. 295). Thereafter Niagara Lockport conveyed to the Power Company the lands, buildings, plant and machinery (but not the water rights) in satisfaction of the judgment debt which it had assumed. The Power Company accepted the conveyance as extinguishing the debt. Simultaneously it leased the water rights from Niagara Lockport and, as the consideration therefor, agreed to furnish Niagara Lockport a stated amount of electric energy, for which the latter was to pay at cost (R. 286). These transactions were laid before and approved by the New York Public Service Commission (R. 272-80). Since that time the Power Company has utilized the 262.6 cfs of water.

In 1945 Niagara Lockport was consolidated into Buffalo Niagara Electric Corporation, which thereupon succeeded to the Pettebone-Cataract rights. It was then proposed that Buffalo Niagara sell to the Power Company its

rights in the 262.6 cfs for $728,415.48, the cost to Niagara Lockport when it had acquired the water rights from the Pettebone-Cataract companies (R. 269-72, 292-4). The New York Public Service Commission approved and authorized the transfer in February, 1947 (R. 302), reviewing the history of these rights at length (R. 260-304) and concluding that the price of $728,415.48 therefor was originally fixed "by arms length bargaining between two non-affiliated parties." (R. 301). After that approval the companies filed a declaration with the Securities and Exchange Commission, under the Public Utility Holding Company Act of 1935, for consent to or approval of the transaction as a sale of utility assets; and in February 1947, that Commission entered an order permitting the declaration to become effective (R. 309).

The Power Company also requested the Federal Power Commission to agree to the amendment of paragraph 13 of the Project No. 16 license, quoted above at pp. 6-7, so as to record the effect of its acquisition of the Pettebone-Cataract water rights from Buffalo Niagara, by eliminating therefrom the reference to "rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee * * *." This request was in conformity with the provision of the Federal Power Act that licenses thereunder may be altered only upon mutual agreement between the licensee and the Commission. Act, Sec. 6. In November 1947, the Commission refused to agree to the amendment saying in its Opinion No. 159 (R. 389):

> "In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66. * * *

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> The licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law."[6]

Subsequently, in the proceeding to determine amortization reserve liability which gave rise to the present case, the Commission artificially increased Respondent's operating revenues from the period from March 1941 through December 1946 by the difference between the price paid by Niagara Lockport and Buffalo Niagara for power supplied to them under the 1925 agreement and Respondent's normal rates. This artificial increase amounted to $37,800 annually (R. 32, 109).

D. The Basis of the Commission's Action.

The Commission's Opinion No. 200 (R. 105) disposes of both issues summarily: The International Paper Company issue "is fully controlled in legal principles and result by the holding * * * regarding the Pettebone-Cataract claim." (R. 110); as to the latter claim, "Opinion No. 159 fully controls. Licensee cites no valid contra law." (R. 109).

Thus the basis of the Commission's holding is Opinion No. 159 (R. 387); and the core of that opinion is the statement that Buffalo Niagara does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States.

This is the sole ground of the Commission's action. There was not, nor could there be, any attack upon the

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[6] The Commission in the Court below asserted that its Opinion No. 159 was *res judicata* in the present proceeding, a contention rejected by the Court (R. 594) and which we do not understand the Commission reasserts here (Br. 9).

agreements relating to the Pettebone-Cataract and Paper Company rights on any ground of improvidence, fraud, illegality or other infirmity.

Summary of Argument

The present controversy arises from an attempt by the Commission, arbitrarily and in violation of the Fifth Amendment, to disregard obligations under subsisting contracts made in acquiring water rights. The fundamental and egregious error of the Commission lies in construing a regulatory statute as a confiscatory enactment. The court below, in reversing the Commission, properly held this construction to be a misconception of the Federal Power Act and of the nature of the licenses issued thereunder.

The following propositions form the background for our argument that the International Paper Company and Pettebone-Cataract rights were not destroyed by the passage of the Act in 1920. Since the Revolution proprietary rights to use water for power purposes have had their source in and have been determined by State law. In New York, the right to use the waters of a flowing stream for power purposes arises by operation of law and as incident to ownership of the bank. Such a right is, in New York, a corporeal hereditament and real property and may be severed from the land and granted or conveyed in whole or in part. Furthermore, the rights of International Paper Company have been specifically recognized as valid proprietary rights by this Court and those of the Pettebone-Cataract companies by the courts of New York.

Federal regulation of the use of waters from the Niagara River under the Act has not destroyed private

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proprietary rights to such use valid under the law of New York, nor has the Act empowered the Commission to disregard payments made and obligations incurred in acquiring such rights. The Act itself contains no provisions abolishing water rights; to the contrary, many sections of the Act expressly recognize the existence of water rights. Moreover, the legislative history of the Act shows a clear intention not to infringe on any rules of property of the States with respect to the diversion of water. Indeed, the weakness in Petitioner's interpretation of the Act as confiscatory is perhaps most clearly demonstrated by the dearth of legislative history cited in support thereof.

The authorities construing the Act interpret it as an instrument of regulation and not of confiscation. And this Court has expressly held that the Act was not intended to interfere with the validity of water power rights existing under the law of New York and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son, Inc.* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930). And Petitioner's reliance on *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) is misguided for in that case Congress had enacted a statute expressly declaring that ownership in fee of certain property by the United States was necessary for a navigation improvement—a totally different concept from that underlying the Act which set up the Commission as a regulatory body.

ARGUMENT

I

The rights of private persons to the use of waters of a navigable stream are property rights deriving from state law and the rights here in question were validly created in accordance with the law of New York.

We begin with the following propositions correctly decided by the court below.

A. There is no claim here to ownership of navigable waters (R. 594).

The rights here in question are rights to use temporarily for the production of power waters drawn from Respondent's artificial canals, and then returned to the Niagara River. This *use* of the waters is a very different thing from the concept of *ownership* of the waters themselves. The distinction is fundamental, as pointed out in *Sweet* v. *City of Syracuse, et al.*, 129 N. Y. 316, 335 (1891):

> "It is a principle, recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes (2 Bl. Com. 18): 'Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein.' While the right to its use, as it flows along in a body, may become a property right, yet the water

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itself, the *corpus* of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, * * *."

B. Proprietary rights to use water for power purposes are derived from and determined by State law (R. 595).

It was early established in *Martin* v. *Waddell*, 16 Peters (41 U. S.) 367, 410 (1842):

> "* * * when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

And this Court recently recognized the distinction between "*dominium* (ownership or proprietary rights) and *imperium* (governmental powers of regulation and control)"[7] and quoted from *United States* v. *Oregon*, 295 U. S. 1, 14 (1935), as follows:

> "'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York*, 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the

[7] *United States* v. *Texas*, 339 U. S. 707, 712 (1950).

> title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.' " (339 U. S. at 717)

Thus, the States retained their proprietary rights in inland navigable waters, that is, their *dominium*; and ceded to the Federal Government only certain powers of regulation and control over such waters.

Also well established is the proposition that the nature and extent of proprietary rights of riparian owners in navigable waters within the State and to the soil beneath are matters of State law, to be determined by the statutes and judicial decisions of the State. *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1876) (Mississippi River); *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 702-703 (1899); *Fox River Paper Company* v. *Railroad Commission*, 274 U. S. 651, 655 (1927); *Kaukauna Water Power Company* v. *Green Bay & Miss. Canal Company*, 142 U. S. 254, 272 (1891); *Kansas* v. *Colorado*, 206 U. S. 46, 93-94 (1907); *United States* v. *Cress*, 243 U. S. 316 (1917); *Massachusetts* v. *New York*, 271 U. S. 65, 85-6, 89 (1926) (Lake Ontario).

In the *Cress* case, this Court stated the rule succinctly as follows:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks [citations], subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of com-

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merce among the States and with foreign nations [citations]; * * *." (243 U. S. at 319-20)

C. The International Paper Company and Pettebone-Cataract rights are valid usufructuary property rights under the law of New York (R 608).

In New York, the right to use the waters of a flowing stream for power purposes arises by operation of law as incident to the ownership of the bank and is a part of the estate of the riparian owner. *United P. B. Company* v. *Iroquois P. & P. Company,* 226 N. Y. 38, 46 (1919); *Waterford Electric Light, Heat and Power Company* v. *The State of New York,* 208 App. Div. 273, 283 (1924); *aff'd without opinion,* 239 N. Y. 629 (1925).

Such a right is, under the law of New York, a corporeal hereditament and real property, *Van Etten* v. *The City of New York,* 226 N. Y. 483 (1919); and the right of one of Respondent's predecessors, Niagara Falls Hydraulic Power and Manufacturing Company, to divert water from the Niagara River has been so characterized. *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company* v. *Smith,* 70 App. Div. 543 (1902), *aff'd without opinion,* 175 N. Y. 469 (1903). There the decision, as to whether the water rights of the power company should be included in the assessed value of its property for tax purposes, depended on whether such rights constituted real property or merely a franchise. Said the Court:

> "The relator, as a riparian owner and as owner of the lands under the waters of the Niagara River adjacent to its uplands from which the water is immediately taken, has the right to the use of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it does, after passing over its own lands [citations], subject only to the para-

> mount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream, such right being in no sense in the nature of a franchise but a corporeal hereditament, not depending either upon grant or prescription." (70 App. Div. at 546)

Of the character of private rights in the use of water, the Court said in *Tracy Development Co.* v. *Becker,* 212 N. Y. 488 (1914):

> "Water is not land. It is an incident to land which gives to the owner of the land certain rights and privileges in the use of the water. If it flows over his own land it is so far identified with the realty as to be a corporeal hereditament; and if the right is to use it as it flows over the lands of another it is an incorporeal hereditament. In either event the right of property in the water is usufructuary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected. Since such an hereditament is incident to land, it naturally passes with land, and, therefore, it is properly classified as real property in the 'Real Property Law', in the 'Statutory Construction Law' and in the 'Tax Law.'" (p. 499-500)[8]

[8] "The terms 'real property' and 'lands' as used in the first eight articles of this chapter are co-extensive in meaning with lands, tenements and hereditaments." N. Y. Real Property Law, §2.

"The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal." N. Y. Gen. Const. Law, §40.

Also, the N. Y. Conservation Law §613 (12) defines real property as follows:

"'Real property' without words of limitation, includes all uplands, lands under water, waters of any lake, pond or stream, all water and riparian rights or privileges, * * * and all land, water and rights necessary to carry out any project or development provided for by this article, including the right to divert running water of any stream or streams * * *."

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Specifically, Respondent, as a riparian owner, has a right under New York law to divert and use water from the Niagara River for power purposes. Such a right is, under the above authorities, a corporeal hereditament and real property. Moreover, the rights of Respondent's predecessors in title have been specifically confirmed and defined by a series of New York statutes,[9] none of which has ever been repealed.

Under New York law, a riparian owner's right to use the waters of a navigable stream can be severed from the land and granted or conveyed by the owner thereof in whole or in part, as was done in the instant case. *United P. B. Company* v. *Iroquois P. & P. Company,* 226 N. Y. 38, 46-7, 49 (1919).

Furthermore, the courts of New York have characterized the Pettebone-Cataract rights thus:

> "The defendants [Pettebone-Cataract companies] by mesne conveyances (the details of which are not of controlling significance) are respectively the owners of certain water rights, by virtue of which they take and have for years taken quantities of water from such basin and conducted the same to turbines upon their properties and thereby generated electrical power for their own private uses." *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.,* 198 App. Div. 644, 646 (1921) (R. 332).

That is clear judicial approval of the validity of the Pettebone-Cataract companies' rights to utilize water from the canal basin. Those are the very rights which Petitioner now argues no longer exist.

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[9] N.Y.L. 1886, c. 489; L. 1889, c. 109; L. 1891, c. 253; L. 1892, c. 513; L. 1893, c. 477; L. 1896, c. 968; L. 1918, c. 597; R. 396-408.

> mount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream, such right being in no sense in the nature of a franchise but a corporeal hereditament, not depending either upon grant or prescription." (70 App. Div. at 546)

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Furthermore, the courts of New York have characterized the Pettebone-Cataract rights thus:

> "The defendants [Pettebone-Cataract companies] by mesne conveyances (the details of which are not of controlling significance) are respectively the owners of certain water rights, by virtue of which they take and have for years taken quantities of water from such basin and conducted the same to turbines upon their properties and thereby generated electrical power for their own private uses." *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.,* 198 App. Div. 644, 646 (1921) (R. 332).

That is clear judicial approval of the validity of the Pettebone-Cataract companies' rights to utilize water from the canal basin. Those are the very rights which Petitioner now argues no longer exist.

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[9] N.Y.L. 1886, c. 489; L. 1889, c. 109; L. 1891, c. 253; L. 1892, c. 513; L. 1893, c. 477; L. 1896, c. 968; L. 1918, c. 597; R. 396-408.

The same general principles apply to the International Paper Company water rights. Specifically, those rights were described by this Court in *International Paper Company* v. *United States,* 282 U. S. 399, 404-5 (1931), as follows:

> "The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate."

The right of the Paper Company there described is the very right later acquired by Respondent, by defeasible grant conditioned on annual payments—payments which Petitioner now claims should be disallowed on the erroneous theory that the right of the Paper Company no longer exists.

The foregoing principles clearly establish that both the Pettebone-Cataract and the International Paper Company water rights are usufructuary rights based on riparian ownership and recognized as corporeal hereditaments and real property. These settled principles completely destroy Petitioner's studied attempts to undermine these rights by contending that they were acquired under revocable state statutory grants and are not based on riparian ownership (Br. 5, 6, 49, 51). We shall have more to say later about this attempted slander of title. Suffice

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it to say here that Petitioner's arguments on this score were decisively rejected by the court below in holding that both the Pettebone-Cataract and International Paper Company rights depend on original riparian rights (R. 597) and that Petitioner was incorrect in asserting that neither the owners of those water rights nor their predecessors owned any riparian land to which the water rights are appurtenant (R. 608). Petitioner's brief does not so much as mention that portion of the opinion below or attempt to contest its validity; rather, Petitioner simply persists in its incorrect statements of the facts regarding the origin of the water rights in question.

Equally unfounded is the assertion that a distinction between private ownership of flowing waters and usufructuary property rights—long recognized at common law—"accords to private interests first mortgages on the water power of the Nation, and elevates those interests above the Federal Government and the consumer" (Br. 24). This is nothing short of a contention that private rights must be regarded as non-existent if they happen to conflict with an unbridled and unauthorized assertion of power by a Federal agency as here. To the contrary, under our system of law private rights continue to exist and will always be protected against an attempted Federal usurpation. *Youngstown Sheet & Tube Company et al.* v. *Sawyer,* 343 U. S. 579 (1952). Only if the intent to appropriate is clear and manifest will the exercise of Federal power be regarded as superseding private property rights, and then only for a proper constitutional purpose; nor can this fundamental concept be evaded by Petitioner's complaining that to recognize private rights is "to raise the formalistic terminology of property law to the level of federal power." (Br. 20). In the case at bar the intent of the Act is to establish Federal regulation, not confiscation, of privately-owned rights to use water for power purposes.

II

Federal regulation of the use of water from the Niagara River for power purposes has not destroyed private proprietary rights to such use valid under New York law, nor has the Federal Power Act empowered the Federal Power Commission to disregard payments made and obligations incurred in acquiring such rights.

It cannot be too strongly emphasized at this point that the sole question here is whether the Federal Government *has exercised* its powers over navigable waters so as to confiscate the rights before this Court. The test is what *has* been done and not what *may* be done. We do not ask that this Court reverse its holding in *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) that water rights of riparian owners are subject to a non-compensable taking by the United States acting in the proper exercise of its power to improve navigable waters. That issue is not present here. The Court below correctly defined the issue before it to be whether the United States has exercised its paramount authority so as to accomplish the taking of these rights—not whether it could do so (R. 600). We turn to a consideration of the applicable statutes.

A. Regulatory measures prior to the Act.

The Rivers and Harbors Act of 1899 prohibited the creation of obstructions to or interference with the navigable capacity of any of the waters of the United States unless approved by the Federal Government. Federal regulation of amounts diverted from the Niagara River began in 1906 when Congress passed the Burton Act (R. 416) pro-

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hibiting such diversions except under permit from the Secretary of War. Under that Act, permits could be issued only to individuals, companies or corporations then actually producing power from the waters of the River. The maximum amount of all such permits was not to exceed 15,600 cfs. Respondent's predecessors in title applied for and received such permits (R. 436, 356). That Act also contained a provision requesting the President to open negotiations with Great Britain for the purpose of effectually providing by treaty for such regulation and control of the waters of the Niagara River as would "preserve the scenic grandeur of Niagara Falls" (R. 418).

The International Boundary Waters Treaty between the United States and Great Britain limiting the diversion of water from the Niagara River was proclaimed in 1910 (R. 438). The Court below correctly observed that the only purpose of the two Governments in restricting diversion of waters from the Niagara River was to prevent the level of Lake Erie and the flow of the River from being appreciably affected by diversion for power purposes and that the parties desired to accomplish this objective with the least possible injury to investments which had already been made in the construction of power plants on the United States side of the River under grants of authority from the State of New York (R. 603).

The Burton Act as extended by Congressional Joint Resolutions in 1909, 1911 and 1912 and the permits granted thereunder to Respondent's predecessors expired in 1913 (R. 358-9, 437, 452-4). Soon thereafter, the Attorney General of the United States rendered an opinion (R. 360) that diversions from the Niagara River—if in such quantity as substantially to interfere with its navigable capacity —were prohibited under the Rivers and Harbors Act of 1899 unless approved by the Secretary of War. Thereupon the War Department wrote The Niagara Falls

Power Company that it made no objection to existing diversions in amounts authorized under the Burton Act (R. 455). This letter, which specifically refers to the Rivers and Harbors Act of 1899, is wholly ignored in Petitioner's studied statement that from 1913 to 1917 diversions were made "in spite of the prohibition" of that Act (Br. 58).

In 1917 Congress authorized the Secretary of War to issue permits to individuals, companies or corporations then actually producing power from the waters of the Niagara River for additional diversions, the total amount in no event to exceed the 20,000 cfs maximum set by the International Boundary Waters Treaty (R. 457); and under that warrant the Secretary of War issued permits to Respondent's predecessors in title authorizing additional diversions (R. 365-6, 459, 462).

It should here be noted that it was in December 1917 that the Secretary of War requisitioned the total output of electric power of The Niagara Falls Power Company (R. 463) and shortly thereafter he informed it that the requisition order was intended to cover all water being diverted by it, including water being taken from its intake canal by the International Paper Company. The loss of this water caused a shutdown of the Paper Company's plant and consequent losses. The Paper Company brought suit to obtain compensation for such losses, on the ground that the requisition order constituted a taking of private property for a public use within the meaning of the Fifth Amendment. *International Paper Company* v. *United States*, 282 U. S. 399 (1931). It was in this litigation that this Court characterized the rights of the Paper Company which Petitioner now claims do not exist as "a corporeal hereditament and real estate" (p. 405) and held that "the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and

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for which it was bound by the Constitution to pay." (p. 407). Apparently, the Commission no longer contends that the decision of this Court in that case does not pass upon the validity of the Paper Company's water rights (Br. 49 n. 41, R. 110). We therefore here assume that the Commission concedes the correctness of the decision below in that respect (R. 597).

In June 1918, Congress by Joint Resolution again prohibited diversion of water from the Niagara River for the creation of power except under a permit from the Secretary of War (R. 465). The Secretary was authorized to issue permits, revocable at will, to individuals, companies or corporations then actually producing power from said waters. A permit was issued to The Niagara Falls Power Company (R. 466). The Joint Resolution, which was by its terms to terminate on July 1, 1919 or such earlier date as Congress enacted legislation regulating and controlling diversions from the Niagara, was extended to July 1, 1920, subject to the same condition as to earlier termination (R. 468). The Power Company's permit was also extended (R. 469).

B. The Federal Water Power Act of 1920.

The Federal Water Power Act, now Part I of the Federal Power Act, became law June 10, 1920. Petitioner asserts that the Federal Water Power Act eliminated all private proprietary rights to use water for power purposes (Br. 21); indeed, the Act is variously said to have "destroyed", "eradicated", "abolished", "wiped out" and "terminated" all such rights country-wide. But this catalogue of confiscatory labels is derived from the dictionary and not from the Act. To the contrary, the express terms of the Act, its legislative history and the authorities construing it plainly demonstate otherwise. Control, not confiscation, is the keynote of the Act. As this Court

recently said, the objective of the Act was "the creation of a commission with functions and powers comparable to those of the Interstate Commerce Commission in the field of transportation." *United States ex rel. Chapman* v. *Federal Power Commission, et al.*, 345 U. S. 153, 168 (1953).

We need look no further than the face of the statute itself to discover that Congress, in creating the Federal Power Commission as a regulatory body, did not intend the destruction of state-created water rights.

For example, Section 3(11) defines the word "project" as a "complete unit of improvement or development, consisting of a powerhouse * * * and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit; * * *"

Section 4(b) empowers the Commission, in determining original cost and net investment in a project, to require licensees to file a statement showing "the price paid for water rights" as well as lands and interests therein.

Section 9(b) requires that each applicant for a license submit evidence that it has complied with the requirements of State law "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."

Section 10(c) provides that each licensee "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, * * *."

Under Section 14 it is provided that for purposes of determination of the amount to be paid by the United States in the event of taking over a licensed project after the expiration of the license, "the values allowed for water

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rights" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee"—thus evidencing a clear intendment that the payment then to be made shall allow a value for water rights.[10]

Again, Section 21 provides that when any licensee cannot acquire by contract the property of others necessary to a power project, it may acquire the same by the exercise of the right of eminent domain—thus recognizing the necessity of a licensee acquiring adverse property rights such as water rights by condemnation (which imports compensatory payment) if not by contract.

Finally, Section 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Would any of these sections have been written into the Act had it been the purpose of Congress to wipe out private rights? It is no answer to suggest that Sections 3(11) and 14 "may easily be read" to support Petitioner's view of the Act (Br. 48). The issue is not to be resolved by a mere speculative reading of selected portions of the Act. Rather, the question of whether the Act did by its terms and was intended to wipe out all private water rights is to be decided in the light of plain words of the

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[10] In the proceeding below before the Commission, Commissioner Smith in dissenting said (R. 118):

> "This language [of Section 14], together with other pertinent provisions of the Act constituted, in my opinion, recognition by the Congress in 1920 that valid rights to make use of water for power purposes existed and had been transferred and acquired for *bona fide* payments at arms length and in accordance with the customs and general understanding of the law at that time."

statute itself, read in the setting of its legislative history and the authorities construing it.

C. Legislative history of the Act.

The fundamental weakness of Petitioner's position is perhaps most clearly demonstrated by the dearth of legislative history to support its view. Unable to point to any persuasive legislative history during the many years of Congressional consideration preceding the passage of the Act, Petitioner is forced to turn to its notions of the purposes and the theory of the Act (Br. 22, 25-30). The striking weakness in this portion of the brief is that the only authority the Commission can muster in support of its contention that Congress asserted its dominant servitude in water power rights in navigable water (Br. 25), is a single remark of Representative Anderson using the word "recapture" (Br. 28-9) and language from two veto messages delivered several years before Congress began consideration of federal power bills in 1913 (Br. 26-7). It is true that the conservationist philosophy expressed in the two veto messages of President Theodore Roosevelt was one of the factors that led to Congressional consideration of water power legislation; but it is far from correct to suggest, as does the Commission (Br. 26-30), that Congress wholly embraced that philosophy and carried it into the Act in such a way as to constitute all private water rights "governmental assets" (Br. 29). Rather, the Act was designed to set at rest the uncertainties created by that philosophy which had hampered the development of power projects by private interests, as shown below. As for the remarks of Representative Anderson, a member of the House Committee on Water Power which reported the bill, their full text discloses that he later described the

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Act as an instrument of "regulation" and "control". 56 Cong. Rec. 9282 (1918).

The fact is that Petitioner's argument largely ignores the legislative background of the Act, perhaps because it is at variance with Petitioner's theoretical notions as to the purposes of the Act. For the clear Congressional intent was that of "encouraging private enterprise and the investment of private capital" in power projects, consistent with the public interest. H.R. Rep. No. 61, 66th Cong., 1st Sess. 3 (1919); Sen. Rep. 180, 66th Cong., 1st Sess., *passim* (1919); *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180-1, n. 23 (1946). The same purpose is reflected in the statement of Secretary of Agriculture Houston, quoted in both the foregoing Reports, that the bill proposes a method by which the water powers of the country can be developed "under conditions which will give the necessary security to the capital invested", while at the same time protecting the public interest.

During the Congressional debates a fuller explanation of the reasons for the Act was presented by Representative La Follette, a member of the House Committee on Water Power which reported the bill. He said:

> "This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment.
>
> We have for many years been trying to develop more or less power from rushing or falling water in many states of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could

statute itself, read in the setting of its legislative history and the authorities construing it.

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not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

* * * * *

Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority but little development had been made.

* * * * *

This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * *This bill is not based on either the Government's ownership or its sovereign authority*, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it. * * * *Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction* for the period covered by any license, the State having exercised its rights in advance of issue.

* * * * *

By the enactment of this bill we shall be able to develop our water powers, *recognizing the States' rights as to water, bed, and bank control.* * * *" 56 Cong. Rec. 9109-10 (1918). (Emphasis added)

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As evidence that the bill was not intended to interfere with the jurisdiction traditionally held by the states over proprietary rights, Representative La Follette later pointed to Section 9(b) which provides:

> "* * * each applicant for a license hereunder shall submit to the commission—
>
> * * * * *
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."

Of that section he remarked:

> "* * * in this section * * * we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917 [*United States* v. *Cress,* 243 U. S. 316, cited at p. 14 above]. The opinion was delivered by Mr. Justice Pitney, and in that he says:
>
> 'The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.'
>
> * * * * *

> If we put in this language, [of Section 9(b)] which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that *we have not infringed any of the rights of the States in that respect, or any of their rules of property,* and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development. We are earnestly trying not to infringe the rights of the States." 56 Cong. Rec. 9810 (1918). (Emphasis added)

Little need be said regarding Petitioner's frivolous statement that Representative La Follette's remarks refer to property rights in fast lands and have no bearing on interests in "raw water" (Br. 46). Even a casual reading of the remarks themselves—not quoted in Petitioner's brief—reveals specific mention of property rights to diversions of water.

D. Authorities construing the Act.

This Court has expressly held that the Act was not intended to interfere with the validity of water power rights existing under the law of New York and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son, Inc.* v. *Little Falls Fibre Company,* 280 U. S. 369 (1930). In that case the defendant, in the construction of a hydroelectric project licensed under the Federal Water Power Act, installed flashboards on the top of a dam owned and maintained by the United States in the Hudson River, thereby raising the water level at the plaintiffs' plant upstream on the navigable Mohawk River and reducing the head of water formerly available to furnish power for their mills. The plaintiffs sought an injunction to restrain

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this interference with their riparian right, under the law of New York, to use the natural flow of the river for power purposes. The defendant argued that any such right was "subordinate to the power of the national government exerted by the Commission through its licensee, whose action so far as it affects respondents' water power is *damnum absque injuria*" (p. 376)—citing the *Chandler-Dunbar* case, the Commission's chief reliance in the case at bar.

The Court answered (p. 377):

> "* * * even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation [the Federal Water Power Act] does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation."

This Court referred to Sections 10(c) and 27 of the Act as support for this conclusion, and continued (pp. 378-9):

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by §27 from destruction or appropriation by licensees without compensation, * * *."

This, then, is a clear holding that proprietary rights to use the waters of a navigable stream for power purposes, existing under the laws of New York, were not destroyed by the Act. The case also illuminates the fundamental errors of the Commission in concluding that there can be no private property rights to the use of waters of a navigable stream, and in claiming that a license confers on a licensee the absolute right to use such waters regardless of the property rights of others therein. Respondent had no power to acquire the rights of either the Paper Company or of the Pettebone-Cataract companies without compensating the owners therefor. The Commission's disregard of such compensation in the computation of Respondent's amortization reserve is therefore arbitrary and capricious and not in accordance with law.

Petitioner attempts to undermine the *Ford* case as involving "very unusual circumstances" (Br. 45)—without explanation of any unusual features whatever. And the opinion itself also disposes of Petitioner's strained argument (Br. 61) that even though private water rights may exist as between private parties they cannot exist as between the Commission and its licensee. For this Court clearly held in that case that "* * * the powers conferred by [the Act] on the Commission do not extend to the impairment of the operation of [state laws] or to the extinguishment of rights acquired under them * * *" (p. 378). Indeed, in the only case relied upon by Petitioner in support of this argument (*Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586 (1950)), this Court expressly assumed the validity of the action of the regulatory agency—the very point at issue here.

Nor will it do to suggest (Br. 45) that the *Ford* case was overruled by the *Appalachian Power* case, for in a still later case this Court has applied the doctrine of the *Ford* case with direct citation. *United States* v. *Gerlach*

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Live Stock Co., 339 U. S. 725 (1950). There a dam constructed by the United States had impounded the waters of a navigable river. Downstream riparian owners claimed compensation from the United States for the taking of their riparian right under California law to the natural flow of the river. This Court rejected an argument by the United States that the project had been constructed pursuant to its power to improve navigation and that, therefore, under the doctrine of the *Chandler-Dunbar* case, it did not have to compensate riparian owners for injury to their rights existing under State law. The Court held that Congress had intended the project to be constructed under the reclamation law, stating (p. 734):

> "We cannot disagree with claimant's contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. [Citations] In this respect, Congress' action parallels that in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369."

Again, in a case involving claims against the Government arising out of the same project, it was held that water rights having valid existence under State law must be recognized, the Court observing:

> "Moreover, as pointed out in *Ford & Son* v. *Little Falls Fibre Co., supra*, the Federal Water Power Act contained a provision which required recognition of such private rights, * * *." *Rank* v. *Krug*, 90 F. Supp. 773, 793 (S.D. Cal. 1950).

And in *United States* v. *Central Stockholders Corp.*, 52 F. 2d 322 (9th Cir. 1931), the Court held that a licensee under the Act, who had constructed a dam on a navigable stream, must pay compensation to a lower riparian owner for damages to the latter's right under California law to the natural flow of the river (p. 332):

> "To put it in another way, the law [Act] expressly recognizes all private rights established and determined by the law of the state and expressly requires the permittee, where it interferes with such rights to compensate the owners therefor."

That water rights have value under the Act was recognized in *Alabama Power Company* v. *McNinch*, 94 F. 2d 601 (D. C. Cir. 1937). There, the plaintiff contended that the Federal Power Commission had erred in not including in the original cost of the project the value of a water right acquired from another company. The court agreed, holding that the plaintiff's upstream dam was erected "in derogation of the water right" of the other company (p. 616) and that the acquisition of that right was necessary to the successful completion of the plaintiff's project.

Moreover, this Court has recently reaffirmed that the Act did not destroy proprietary rights existing under State law to use riparian land for power site purposes. *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359 (1948). In 1935, the Oklahoma Legislature created the Grand River Dam Authority and granted to it exclusive authority to develop the water power of the Grand River. The Authority applied for and was granted a license by the Federal Power Commission. The Authority instituted condemnation proceedings in the Oklahoma courts, under a right of condemnation granted by that State, to procure a power site on the Grand River owned by Grand-Hydro. The major issue in that litiga-

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tion was whether the amount to be paid Grand-Hydro for this taking should include the value of Grand-Hydro's right, under Oklahoma law, to use the land for power site purposes. This Court held that it should, stating (p. 372):

> "It is clear that the Federal Power Act cannot be said to have so far affected the use of this land for a power site as to destroy or otherwise render valueless the owner's right to use it for that purpose. That Act merely has attached conditions to the use of the land for a power site. The Act seeks to encourage rather than to prohibit the development of power sites. It seeks to preserve or enhance, not to destroy, their value as such. While the Act has limited the time and manner of the use of this particular land for a power site, the Act has left great benefits available to the owner from such a use of the land."

First Iowa Coop. v. *Federal Power Commission*, 328 U. S. 152 (1946), relied on so heavily by Petitioner, does not hold that private rights to use water were abolished by the Act. First Iowa had applied to the Commission for a license to construct a hydroelectric project involving the diversion of water from one river to another. The Commission rendered an opinion approving the plans but, before the license could be granted, it was confronted with a claim by the State of Iowa that under Section 9(b) of the Act, First Iowa, in order to obtain a Federal license, had to show that it had complied with statutes of Iowa requiring a state permit approving the plans for the project. In fact, such approval could not have been given since the plans involved a violation of a statute of Iowa requiring that water taken from a stream in connection with a power project be returned thereto at the nearest practicable place. The Commission denied the application on the ground that First Iowa had not shown satisfactory evidence of such compliance.

This Court reversed, holding that to require compliance with such state regulatory statutes would be to vest in the state a veto power over the project and would thus "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission * * *." (p. 164). It held that Congress intended that the Commission, not the states, should be the final arbiter in matters relating to the form that a power project should take in order to make the most efficient use of the water power available and that conflicting state laws necessarily yielded. But at the same time the Court made it clear that this authority of the Commission did not extend to such purely local matters as proprietary rights in navigable waters. After quoting the last paragraph of Representative La Follette's statements (pp. 27-30 above), the Court stated (p. 174):

> "As indicated by Representative La Follette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of *the constitutional rights of the States* so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject." (Emphasis added)

And the Court further observed (p. 178):

> "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of *the legal title of the applicant to its riparian rights,* or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service.

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Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in §9(b) to *beds and banks of streams, to proprietary rights to divert or use water*, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage." (Emphasis added)

In short, a conflicting state regulatory statute must yield to the judgment of the Commission as to the most efficient form that a power development is to take. That principle is wholly consistent with the intent of the Act to create a central planning agency for power development. Equally clearly the Act was not intended to derogate from the validity of the proprietary rights of riparian owners existing under the laws of the several states.

E. The Act was not intended to be confiscatory.

The fact is that enactment of the Federal Water Power Act was, as we have shown, intended to encourage water power development by providing a long-term irrevocable Federal permit, and there was no intention of destroying water rights validly existing under State law. As enacted, the Act did not even contain a provision prohibiting structures in navigable waters for the development of power. Such a provision was not included in the Act until the

addition of the first sentence of Section 23(b) in 1935.[11] During the intervening years it would appear that only the provisions of the International Boundary Waters Treaty and the Rivers and Harbors Act of 1899 sought to control diversions of water from the Niagara for the creation of power. The parties to the Treaty clearly had no intention of destroying water rights. As for the Rivers and Harbors Act, the case of *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S.S.M.R. Co.*, 99 F. 2d 902 (8th Cir. 1938), *cert. denied*, 305 U. S. 660 (1939), 306 U. S. 640 (1939), *rehearing denied*, 306 U. S. 667 (1939), held that rights of riparian owners were not thereby abolished. One of the basic issues in that case was whether the placing of piers in the river bed to support a bridge, which the defendant had been authorized to construct by Act of Congress, constituted a trespass. The plaintiff power company argued that, under the law of Minnesota, it as riparian owner had a vested right to make every possible private beneficial use of the bed of the river including the building of dams, and therefore that it was entitled to damages for defendant's interference with its rights caused by the placing of the bridge piers on the bed of the river in front of its upland. The defendant railroad company replied (99 F. 2d at 908):

> "The common law riparian right to build a dam has been completely abolished by the Rivers and Harbors Act of March 3, 1899 * * *."

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[11] Petitioner's assertion (Br. 32) that "Sec. 4(d) (now Sec. 4(e)) * * * prohibits by implication all those acts for which license will be granted" is in marked contrast with the testimony of its counsel in 1947 before a Subcommittee of the Committee on Interstate and Foreign Commerce that "prior to 1935 the Federal Water Power Act contained no prohibition against construction, operation, or maintenance of a single power project at any place in the United States, * * *" Hearings on H.R. 2972 and H.R. 2973, 80th Cong., 1st Sess., 379-380.

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The Court rejected this contention, holding (pp. 908-9):

> "It will be observed that the riparian right to build a dam is not absolutely abolished by this statute; the right is suspended only until the consent of Congress is obtained and the plans have been approved by the designated officers. The statute merely regulates the use of the right; it does not abolish it. * * *"

Indeed, the holding of *Pike Rapids* is equally applicable to §23(b) of the Federal Power Act which as we have said was added in 1935 and which provides in pertinent part as follows:

> "(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act."

This is a far cry from the Commission's sweeping assertion that the Act and its predecessor statutes—presumably referring to the Rivers and Harbors Act—demolished all common law riparian rights (Br. 11). The correct view is, of course, that the proprietary right to use waters of a navigable river for the creation of power is not destroyed by requiring that a license be obtained for the construction or operation of works incidental thereto. Nor does the fact that consent is required convert the Federal Government into the source of the right to construct such works. *International Bridge Co.* v. *New York,* 254 U. S. 126, 133 (1920).

Analogous situations pinpoint Petitioner's error in concluding that the Act has destroyed all private rights to use water for power and converted the Federal Government into the source and fountainhead of such rights. An owner of real estate may be restricted in its use by zoning ordinances, or may not use it for certain purposes —such as selling liquor—unless the necessary permit is obtained. Under Petitioner's view, where the necessary variance or permit had been obtained by the lessee of such property rather than by the owner, the latter's proprietary rights would vanish and he would be precluded from collecting any rental. Again, one may own a motor vehicle and yet not have the right to use it to haul passengers or freight for hire in interstate commerce until the requisite permission has been obtained from the proper authorities; but Petitioner's reasoning would deny the ownership until the permit had been secured. To carry the analogy a step closer to the case at bar: If the owner leases his vehicle to another who then obtains the necessary permit, under Petitioner's reasoning the operator could thereupon refuse to make further payments to the owner. A similar result would presumably be reached where real estate is leased to a railroad company for use in an interstate transportation system. Absurd though all this sounds, it is the result dictated by the Petitioner's erroneous reasoning.

The correct view, of course, is that although an owner of property may not have the right to use it for certain purposes without a permit from the proper authorities, that fact does not abolish his ownership or enable others with a permit to use his property for those purposes free of charge. Nor does it make his property any less the proper subject of bargain and sale.

The soundness of that principle is illustrated by *Cleveland Electric Railway Company* v. *Cleveland*, 204 U. S.

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116 (1907). There the municipality had granted to plaintiff a franchise to lay down a track in the street, and to use the same for transportation purposes. The franchise was not renewed upon its expiration, but the municipality granted to another the right to maintain and operate the existing street railroad. Plaintiff sued the municipality and the new grantee, claiming *inter alia* that the new grant unconstitutionally deprived plaintiff of its property. Admittedly plaintiff had no right to use the tracks, its franchise having terminated, and in fact the tracks had little use other than for transportation purposes. Yet this Court sustained plaintiff's claim, holding that the franchise to operate the street railroad did not carry with it the authority to appropriate plaintiff's proprietary rights in the rails, which rights remained valid even though plaintiff could not use the rails without its franchise.

That principle has also been repeatedly recognized by this Court in cases involving the Interstate Commerce Act. Those cases are particularly apposite here, in view of this Court's holding that the aim of Congress in creating the Federal Power Commission was to set up a body with functions and powers comparable to those of the Interstate Commerce Commission. *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153, 168 (1953). That the Interstate Commerce Act and state regulatory laws do not operate to divest carriers of their proprietary rights—any more then the Federal Power Act effects a divestiture of private rights—has long been recognized by this Court:

> "This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not

> ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation * * *" *Railroad Retirement Board* v. *Alton R.R.*, 295 U. S. 330, 357 (1935)

The breadth of Petitioner's contentions leads it to assert that the continued existence of private water power rights is "completely inconsistent" with the comprehensive powers of control delegated to the Federal Power Commission (Br. 14, 43). This enunciates a principle repeatedly rejected by this Court—for there is no incompatibility between the private right of ownership and the public power of reasonable regulation; they co-exist and do not one destroy the other. *Missouri-Pacific Ry.* v. *State of Kansas*, 216 U. S. 262, 275 (1910); *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 20 (1907).[12]

F. The Chandler-Dunbar and New River cases.

In supposed support of its erroneous interpretation of the Act as confiscatory, Petitioner urges certain language used by this Court in *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) and repeated in

[12] The doctrine that the power to regulate is not the power to confiscate property is exemplified by the following additional decisions:

As to railroads, *Mississippi Railroad Commission* v. *Mobile & Ohio R.R.*, 244 U. S. 388 (1917); *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 175 U. S. 91, 99 (1899);

As to navigable airspace, under the Air Commerce Act of 1926, 44 Stat. 568, *as amended*, 49 U.S.C. §171, *et seq.* (1946), and the Civil Aeronautics Act of 1938, 52 Stat. 973, *as amended*, 49 U.S.C. §401 *et seq.* (1946); *United States* v. *Causby*, 328 U. S. 256 (1946); *Roosevelt Field, Inc.* v. *Town of North Hempstead*, 88 F. Supp. 177 (E.D.N.Y. 1950).

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nited States v. *Appalachian Power Co.*, 311 U. S. 377 1940) to the effect that the flow of a navigable stream in no sense private property (Br. 22). And its efforts find support for its extreme views reach new heights hen it asserts that this "very problem"—whether the Act estroyed all private water rights—was presented to this ourt in the *Chandler-Dunbar* case (Br. 33). Here indeed a monumental inversion of the slogan *nunc pro tunc*, or the Act was passed in 1920 and the *Chandler-Dunbar* ase was decided in 1913. Moreover, as Petitioner's argument as to the *Chandler-Dunbar* case admits (Br. 33-38), here Congress had expressly enacted that ownership fee by the United States of certain lands on a designated river was necessary for the purposes of navigation -a totally different concept from that underlying the tatute setting up the Federal Power Commission as a egulatory body. In view of this fundamental difference f purpose, what possible weight can there be in Petioner's wholly unsupported assumption that such difference is immaterial? (Br. 13).

Chandler-Dunbar involved a statute which declared (Act f March 3, 1909, 35 Stat. 815, 820):

> "That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith."

n accordance with that Act, the Secretary of War conemned those lands and property consisting in part of the ank and bed of the St. Marys River which were owned

by the Chandler-Dunbar Company. This Court noted the principal question before it to be (p. 60):

> "* * * whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been 'taken,' and for which compensation must be made under the Fifth Amendment * * *."

The Chandler-Dunbar Company did not deny that its rights to the water power of the river were subject to a non-compensable taking by the United States in the proper exercise of its dominant power to improve navigable waters, but claimed that this power of the United States did not extend to such a taking of rights of riparian owners to use the water power of the river so long as all possible requirements of navigation were not interfered with. Observed the Court (p. 61):

> "This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made."

and it continued (p. 62):

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. * * * It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the

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> exercise of the great and absolute power of Congress over the improvement of navigable rivers. * * * If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

This Court concluded as follows (p. 65):

> "The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was conclusive."

At most then, this Court held that the rights of an owner of the bank and bed of a navigable river to use the bed and flow of that river for the production of power are subordinate to the dominant power of the United States to improve navigable waters and that therefore the extinction of those rights in the course of an actual navigation improvement by the United States is not a "taking" of private property within the meaning of the Fifth Amendment.

Subsequent cases involving takings of a riparian owner's property by the United States acting in the exercise of its

power to improve navigable waters are in accord with *Chandler-Dunbar. United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 (1941); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386 (1945); *United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945). The rationale of these cases was stated in *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799 (1950), involving a claim against the Government for damages caused to private land by the construction of a Government dam. This Court said (p. 808):

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§86-90 (1883); I Farnham, Waters and Water Rights, c. III, §29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream."

These cases stand for the proposition that the destruction of riparian rights by the United States acting in the exercise of that servitude is not a "taking" of private property within the meaning of the Fifth Amendment since such rights are and have, since ratification of the Constitution, always been subordinate to that servitude. It was in this context that this Court in *Chandler-Dunbar* remarked that "the flow of the stream was in no sense

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private property" and "that the running water in a great navigable stream is capable of private ownership is inconceivable." (229 U. S. at 66, 69).

That language was repeated in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427 (1940). There, the United States sought to enjoin the construction of a dam by the power company except under license from the Federal Power Commission. The power company argued that certain provisions of the license offered it were unconstitutional. In particular, it argued that, as a riparian owner with, as the Court noted, as complete a right to the use of the riparian lands, the water, and the river bed as could be obtained under State law, it could not be compelled to submit to the acquisition clause in the license with a price fixed at less than a fair value in the eminent domain sense. Under Section 14 of the Act and the acquisition clause, the United States may take over a licensed project at the expiration of the license upon payment of the net investment (not to exceed the fair value); and the statute provides that the values allowed for water rights included in such net investment shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. Said the Court (at pp. 427-8):

> "It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra*, [citing *Chandler-Dunbar*] that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in §14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In

> our view this 'is the price which [respondents] must pay to secure the right to maintain their dam.' "

We do not argue here with the proposition that if the Government itself were to build the dam in the exercise of its power to improve navigable waters it would have to pay nothing for the water power. That question is not at issue here. We do quarrel with Petitioner's conclusion that passage of the Act has made water rights valueless (Br. 13, 24). Section 14 provides that the actual reasonable cost (not to exceed the fair value) of water rights shall be included. And this Court did not proclaim, as Petitioner would like to believe, that such rights do not exist or have been destroyed. To the contrary, it said, "We assume without deciding that * * * these riparian rights may pass to the United States for less than their value." We find no warrant here for a conclusion that riparian rights do not exist or have no value. To the contrary, the conclusion to be drawn is that the actual reasonable cost thereof rather than the then fair value shall be included in the net investment to be paid the licensee by the United States.

Moreover, the Federal Power Act did not constitute an exercise by the United States of its servitude over navigable waters. One can find in it no declaration that all the waters of all of the navigable rivers of the United States are necessary for purposes of navigation as was the case in *Chandler-Dunbar*. Surely some such provision would have been included had the Act been intended to constitute a taking as was the statute in *Chandler-Dunbar*.[13]

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[13] In fact, Congress knew of the *Chandler-Dunbar* situation at the time of its debates and hearings on the Water Power bill and the bill's managers were at pains to assure their colleagues that it was not intended to accomplish a specific taking as was the statute in *Chandler-Dunbar*, 59 Cong. Rec. 1040 (1920); 59 Cong. Rec. 1431 (1920); *Hearings of the House Committee on Water Power*, 65th Cong., 2d Sess. 879 (1918).

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G. Section 27.

Nevertheless, Petitioner's misconception of the Act as confiscatory leads Petitioner to view Section 27 as the lone provision in the Act preserving private water rights —as a saving clause rescuing only a limited category of those rights from the wholesale destruction supposedly perfected by Sections 1-26 (Br. 43-8). Section 27 states:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Petitioner asserts that there is nothing in the Act which preserves private water power rights (Br. 14, 43-8), that unless those rights were expressly saved by the Act they were abolished (Br. 14), and that the Act is "expressly designed to prevent the preservation by way of implication" of those rights (Br. 46-7). Few statements more sharply illuminate the fundamental fallacy of the Commission's argument, which essentially rests on the mistaken notion that one must assume that a regulatory statute wipes out private rights unless the Act in express terms preserves them. This is an unbridled reach of the Federal arm, apparently resting on destruction by implication. The correct view is precisely the contrary; no such destruction by silence will be assumed, nor will such a drastic step be imputed to Congress in the absence of a clear and unequivocal intention expressed in the Act and its legislative history.

Nevertheless, on the basis of certain language in this Court's opinion in *First Iowa*, Petitioner asserts that the words "other uses" in Section 27 must be confined to rights

of the same nature as those relating to the use of water in irrigation or for municipal purposes (Br. 44-6). As we have shown above (pp. 35-7), *First Iowa* merely held that when a State law as to the form of a power development conflicts with the Act, State law must yield to Federal; and it was only in this context—the clash of State and Federal regulation—that the Court had occasion to consider Section 27. *First Iowa* presented no issue as to the effect of the Act on the existence of property rights to use water; indeed, this Court recognized that the regulatory nature of the Act still left to the States their constitutional jurisdiction over such questions as the sufficiency of the legal title of an applicant to its property rights. 328 U. S. at 174, 178.

The tortured construction which Petitioner now places on the Act—that Section 27 was intended as a narrow saving clause tacked on to a statute that in one broad sweep abolished proprietary water rights country-wide—was never decided in *First Iowa*. Nor was there presented to this Court any legislative history in support of this broad contention. None was relevant; and indeed none could have been mustered to support Petitioner's view, for Congressional history reveals precisely the contrary and demonstrates that Section 27 was intended as a recognition of existing water rights.

Thus, during the Congressional hearings, Representative Mondell remarked as follows:

> "This act should contain * * * some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water'. * * * That is simply a statement of facts. It is not a new law. It is simply a recognition of the situation as a guide to administrative

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officers who sometimes forget very basic and fundamental things." *Hearings before the House Committee on Water Power,* 65th Cong., 2nd Sess., 619-20 (1918).

After Section 27 was added to the bill, Representative Mondell remarked:

"I am glad the provision the gentleman [Representative Taylor] urged, and which I also urged in my hearing before the committee, is in the bill. It is highly important, and yet the gentleman knows that it is simply a declaration of fact; it is simply the recognition of a fact; but it is important to have it in the bill." 56 Cong. Rec. 9115 (1918).

And Representative Taylor, the member of the House Committee on Water Power primarily responsible for the addition of Section 27 of the Act (56 Cong. Rec. 9115 (1918)), commented:

"That section [Section 27] not only recognizes and protects our plain constitutional vested water rights, but it is fair and honest, * * *." 56 Cong. Rec. 9912 (1918).

And later:

"This special water-power committee feel that where people now have legally recognized rights of various kinds, we did not want to rip them up.

* * * * *

That is one of the things that all of the western Members have earnestly and jealously guarded against—not to legislate a man out of his existing rights, either in agricultural claims or water rights or coal or oil * * *." 56 Cong. Rec. 10033-4 (1918).

These quotations plainly show that Congress had no intention of wiping out private water rights. Indeed, diligent research into the extensive legislative discussion of the bill has failed to unearth evidence that Congress in any way intended the Act as a confiscatory measure designed to abolish with one sweep private water rights throughout the country. Had such a purpose existed, would there not have been full debate of this issue in Congress and extensive hearings in Committee? Petitioner's construction of the Act cannot be established by innuendo, especially "in view of the dearth of legislative discussion of the matter." *United States* v. *The Public Utilities Commission of California,* 345 U. S. 295, 310 (1953).

Congressional history also reveals that Section 27 was drawn from Section 8 of the Reclamation Act, 32 Stat. 390 (1902). Representative Taylor stated that it "is copied from the reclamation act * * *." 56 Cong. Rec. 9115 (1918). This is readily apparent from a comparison of the two sections:

Section 8, Reclamation Act	*Section 27, Federal Power Act*
"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water *used in irrigation,* or any vested right acquired thereunder, * * *." (Emphasis supplied.)	"SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses,* or any vested right acquired therein." (Emphasis supplied.)

It is obvious that the legislators in copying Section 27 from the Reclamation Act increased the scope of the

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language by adding "or for municipal or other uses." Had the intent been to limit Section 27 to merely irrigation or municipal uses, there would have been no need to add the reference to "other uses". The quoted words must therefore be read not as referring only to uses of the same nature as irrigation and municipal, but rather must have a broader meaning—viz., uses other than those previously specified. For when a general word is subsequently added to a specific enumeration, this Court has rejected attempts to apply the doctrine of *ejusdem generis* since the intent of the legislature must have been to broaden the scope of the specific enumeration; to hold otherwise, as Petitioner urges, would be to impute to the legislature the doing of a meaningless act. *Gooch v. United States*, 297 U. S. 124, 126-8 (1936); *United States v. Mescall*, 215 U. S. 26, 32 (1909).

The relationship between Section 8 of the Reclamation Act and Section 27 of the Federal Power Act assumes particular significance in view of this Court's observation in the *Gerlach* case (p. 33 above) that Congress' action there under the Reclamation Act parallels its action under the Federal Power Act in the *Ford* case. It will be recalled that in the *Ford* case (p. 31 above) this Court pointed to Section 27 as one of the provisions of the Act demonstrating that Congress did not intend that a licensee under the Federal Power Act could destroy without compensation private water rights of others; and in the *Gerlach* case a similar holding was made with respect to private rights in view of Section 8 of the Reclamation Act. Read together, both cases stand for the proposition that private rights are not destroyed by either statute.

It follows that Petitioner is in error in arbitrarily applying the doctrine of *ejusdem generis* to Section 27 and so subverting the Congressional intent. That so-called doctrine is no more than a canon of construc-

tion to be resorted to in the absence of other evidence as to the meaning intended. Particularly, it should never be invoked to subvert the intention of the legislature. *United States* v. *Alpers*, 338 U. S. 680, 682 (1950); *Texas* v. *United States*, 292 U. S. 522, 534 (1934); *Mason* v. *United States*, 260 U. S. 545, 554 (1923); *Danciger* v. *Cooley*, 248 U. S. 319, 326 (1919).

H. The Niagara Falls cost case.

Petitioner seeks to draw some comfort from *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (2d Cir. 1943), *cert. denied*, 320 U. S. 792 (1943), *rehearing denied*, 320 U. S. 815 (1943). That case involved Section 23(a) of the Act providing in pertinent part:

> "* * * The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, * * *: Provided, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects * * * shall * * * be deemed to be the amount to be allowed as the net investment of the applicant * * *."

Respondent had obtained a "fair value" license under Section 23(a) from the Commission in 1921. Later the Commission reversed its position and in 1942 issued an order requiring that Respondent reduce the capitalization of its Project No. 16 to the actual legitimate original cost thereof. Respondent's appeal from this order called upon the Court to determine the scope of Section 23(a).

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The Court decided that Section 23(a), in providing for a fair value license for projects operated under a permit existing at the date the Federal Water Power Act became effective, applied only to projects then operating under continuing Federal permits. The Court held that the Power Company had no such permit, because the permit issued under the Congressional Joint Resolution of July 12, 1919 (R. 468-70) had by its terms expired on the enactment of the Federal Water Power Act and therefore, when the license was issued on March 2, 1921, Respondent had no then existing prior Federal permit for diversion. Hence the Court decided that Respondent was not entitled to a fair value license.

Further definition of the issue involved in the *Niagara Falls* case may be found in the opinion of the Commission rendered in that proceeding:

> "The question presented for our determination is whether the Niagara Falls Power Company, when it applied for a license on July 3, 1920, possessed a valid existing Federal permit, right-of-way, or authority under which it could at its option have continued to operate this project without obtaining such license." *In the Matter of The Niagara Falls Power Company, Licensee,* 3 FPC 206, 212 (1942).

And the Commission pointed out:

> "* * * it is clear that licensee could not qualify for a Section 23 license by reason of any alleged rights it had acquired under state law. It is not necessary therefore to pass upon the validity of such rights." (3 FPC 211-12)

It is thus plain that whether Respondent was entitled to a "fair value" license under Section 23 depended wholly upon whether it held a Federal permit continu-

ing beyond the date the Act was approved, and not upon the validity of its rights under New York law to use the waters of the Niagara River. Any consideration of the validity of those rights by the Court of Appeals for the Second Circuit, therefore, was wholly unnecessary.

Petitioner's reliance upon the remarks of Judge Learned Hand in this case (Br. 25, 30, 42, 59) and upon those of Senator Wadsworth (Br. 41-2, 47, 49, 57) is obviously misplaced. Their remarks were directed to the issue whether Respondent's rights under New York law should be considered as a "permit or valid existing right of way" within the meaning of Section 23 under which Respondent could at its option have continued to operate its project without obtaining a license,—and hence escape any Federal regulation whatever. To assert that a property owner is subject to Federal regulation is a far cry indeed from Petitioner's conclusion that his property is wholly destroyed.

Indeed, none of Petitioner's strained efforts casts any doubt upon the correctness of the holding of the Court below, which interpreted the Act as an instrument of control, not of confiscation. The Court went to the heart of the matter when it referred to the Commission's misconception of the Act, a misconception repeated in Petitioner's brief. Said the Court (R. 607):

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case. And when state law or regulation

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conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the *First Iowa* case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow."

III

Petitioner's assertion that the rights before this Court are "highly attenuated" (Br. 49) and therefore were wiped out by the Act is based on erroneous premises of fact and law.

Faced with a dearth of authority in support of its assertion that the Act was intended to be confiscatory, Petitioner argues that Congress must have intended to wipe out the water rights here in question because of "the circumstances under which [they] were created" (Br. 48), because Congress could not have intended to countenance "dealings in water power rights of the kind involved in the instant case" (Br. 54), and because the rights are "highly attenuated" (Br. 49) and "tenuous, almost transcendental" (Br. 19). Besides being a most novel way of showing the intention of Congress, this argument is based upon erroneous premises of fact and law.

A. Transactions relating to the creation of these rights.

Petitioner asserts that the Pettebone-Cataract and International Paper Company rights are derived not from common law riparian rights but solely from grants made by the State of New York (Br. 51, 57 n. 48) which grants Petitioner implies were unconstitutional (Br. 51 n. 42). We have been at pains to show that Respondent and its predecessors in title owned riparian land on the Niagara

River (pp. 3-4, 17-9); that under New York law the right of such a riparian owner to use water of the stream for power purposes is a corporeal hereditament and real property, and that the rights of Respondent's predecessor in title have been so characterized by the courts of New York (pp. 15-6); that under New York law such a corporeal hereditament may be severed from the land and conveyed in whole or in part, as was done in the instant case (p. 17); and that the Pettebone-Cataract and International Paper Company rights have been recognized, respectively, by the courts of New York and by this Court (pp. 17-8). We find no warrant here for Petitioner's misguided assertion that the rights at bar are derived solely from State grants. Moreover, *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), *error dismissed*, 242 U. S. 272 (1916), the only case cited by Petitioner in support of its implication that the statutory grants defining and confirming Respondent's riparian rights were unconstitutional, has no bearing here. That case—which in no way involved Respondent—held that an act of the State of New York granting to a private corporation virtually entire control over navigation of a substantial section of the St. Lawrence River was unconstitutional. In contrast, the statutes confirming the rights of Respondent's predecessors to divert limited amounts of water from Niagara River do not in any way constitute an abdication by the State of New York of its sovereign powers. (N. Y. L. 1892, c. 513, R. 403; N. Y. L. 1896, c. 968, R. 405).

Furthermore, there has been nothing collusive or secretive about the transactions relating to these rights despite Petitioner's implications to the contrary—here asserted for the first time in the course of this prolonged controversy. (Br. 54, 55). There has never been any affiliation between Respondent and International Paper Company and as long

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ago as 1906 the diversion by the Paper Company was explicitly set forth in The Niagara Falls Power Company's application for a permit under the Burton Act (R. 422, 424). A contemporaneous report, transmitted by the American members of the International Waterways Commission to the Secretary of War, described in detail the diversion by the Paper Company (R. 430-1). The permit was thereafter issued by the Secretary of War and was renewed from time to time during the life of the Burton Act (R. 436, 452, 454); the permit in terms states that the power stations of the Power Company "and of its customers" (referring to the Paper Company, among others) shall be open to inspection by the Federal authorities at all times. After the expiration of the Burton Act, the diversions continued with the knowledge and consent of the Federal authorities. There can be no argument on this score, for shortly after the expiration of that Act, the War Department wrote the Power Company that it had no objection to the continuance of existing diversions (R. 455); and in 1917 and thereafter, pursuant to Congressional Joint Resolutions (R. 457, 461, 465, 468), the Secretary of War issued permits to the Power Company authorizing additional diversions from the Niagara River which again provided that the power stations of the Power Company and of its customers should be open to inspection by the Federal authorities at all times (R. 459, 466, 469). Finally, the Commission itself has been well aware of the existence of the Paper Company rights since its formation, for the Project No. 16 License which was issued March 2, 1921 pursuant to the Federal Water Power Act, stated in part:

> "Such taking over of the project shall also be subject to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company

to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the rights, if any, of International Paper Company." (R. 384)

The existence of the Pettebone-Cataract rights has also been frequently disclosed to the Federal authorities from the very commencement of Federal regulation of diversion of waters from the Niagara River (R. 336-52, 355-6, 371); and Federal permits have authorized and provided for diversions in amounts sufficient to include such rights (R. 357-9, 365, 367). Indeed, the Power Company's 1921 application for a license under the Federal Water Power Act described in some detail proposed construction necessary to utilize the outfall of the turbines of the Pettebone-Cataract Companies; those diversions were described in hearings on the application before the Commission; and after issuance of the license, the proposed construction was completed (R. 337-52). Neither is there any basis here for the Commission's implication that the transactions pursuant to which Respondent acquired the use of the Pettebone-Cataract rights were not at arm's length for, as we have shown, those transactions were submitted to and approved by the New York Public Service Commission (R. 272-80) and that Commission later found that the price paid to the Pettebone-Cataract Companies for those rights was fixed by arm's length bargaining between two non-affiliated companies (R. 297).

B. The rights at bar are not "highly attenuated".

Relying principally upon the case of *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945), Petitioner asserts that "little but an empty shell has been left of [Respondent's] common law riparian water rights." (Br.

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51). Petitioner's confusion is indicated by its next sentence which states in effect that Respondent has no common riparian water rights. At any rate the *Duryea* case does not stand for the proposition urged by Petitioner.

A brief summary of the New York legislation leading up to the *Duryea* case will pinpoint Petitioner's misinterpretation of its holding. The 1918 Act under which Respondent's predecessor companies were consolidated confirmed that the new company should be entitled to all the rights of its predecessors. As a condition of permitting the consolidation, however, New York reserved the right to charge an "equitable rental" on diversions in excess of 15,100 cfs, the amount of diversion allowed the predecessor companies prior to World War I. N. Y. Laws 1918, c. 597 (R. 407). In the early 1930's Respondent contested the amount of an "equitable rental" imposed pursuant to this reservation on certain diversions then being made in excess of 15,100 cfs. The New York Court of Appeals held that, since Respondent had accepted all the benefits of the Act of 1918 under which it was incorporated, it could not deny its obligation to pay such an "equitable rental" imposed by the State pursuant to a right expressly reserved in that Act; and the court refused to review the amount of the rental fixed by the State Water Power and Control Commission. *Niagara Falls Power Co.* v. *Water Power and Control Commission*, 267 N. Y. 265 (1935), *cert. denied*, 296 U. S. 609 (1935).

In 1937, the New York Water Power and Control Commission instituted an action to enjoin Respondent from diverting the basic 15,100 cfs on the ground that it had not obtained a license to do so allegedly required under the New York Conservation Law. That law then provided in substance that diversion of water from the Niagara River for power or other commercial purposes

was unlawful except under a license from the Water Power and Control Commission or by virtue of a "right lawfully and previously acquired". N. Y. Conservation Law, §634. The Court dismissed the action, referring to the cases cited above (p. 15) holding that a riparian owner's right to divert and use water from a navigable river is a valuable property right and to the New York statutes confirming Respondent's rights of diversion. *Water Power and Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div. 460 (1941), *aff'd*, 289 N. Y. 353 (1942). The Court held that these rights, though subject to the reserve powers of the State, exempted Respondent from the provisions of the Conservation Law as to the basic 15,100 cfs since they constituted rights "lawfully and previously acquired".

In 1943, the Legislature amended the New York Conservation Law by deleting the exception accorded to a "right lawfully and previously acquired" and changing the law to provide in pertinent part that any diversion from the Niagara River for power or other commercial purposes was prohibited unless such diversion was "subject to the charging or imposition of an equitable rental pursuant to the provisions of this article".[14] Section 614 of the Conservation Law, pursuant to which the State Commission had imposed a rental for water diverted in excess of 15,100 cfs, was amended to expressly require that, after July 1, 1943, an equitable rental be charged also on diversions up to 15,100 cfs in an amount to be fixed by that Commission; and a further amendment provided that no state license be required for diversion of waters for which a rental is paid.[15]

Respondent then brought an action to obtain a declaration that the 1943 Act was invalid. The New York

[14] N.Y.L. 1943, c. 46.

[15] Id.

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Supreme Court held that the rights of diversion and use possessed by Respondent were not of such a character as to preclude the State, in the exercise of its inherent sovereign power, from imposing a charge thereon. *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945). It should be noted that Respondent has never been required to obtain a license from the State. Its diversions from the Niagara have never been interfered with and have continued to date. To hold that the exercise of a proprietary right is subject to the imposition of a charge by the State is not to hold that the right itself has been in effect destroyed, as Petitioner attempts to argue from the *Duryea* case (Br. 52-3). That holding was confirmation, not destruction, of Respondent's rights, as the Court below correctly held (R. 598).

In closing, we submit that the Commission's action here under review disregards valid and existing rights and contractual obligations which Respondent is bound to respect unless and until relieved therefrom by a judgment or decree of a court of competent jurisdiction. *Ford & Son, Inc.* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930); *Matter of Aluminum Company of America* v. *Maltbie*, 289 N. Y. 357 (1942).

The Commission cannot justify its action by claiming that under the decision below the United States will have to pay for these water rights upon acquisition, and every year consumers will have to pay for those rights in their rates (Br. 12, 23). The fact is that under the terms of Section 14 of the Act, if Congress later should decide that the United States is to take over a licensed project, the actual reasonable cost (not to exceed fair value) of water rights at the time of acquisition by the licensee must be paid for. And so far as the consumer is concerned, Petitioner's argument appears to be based on a misconception in suggesting that the Federal Power

Commission fixes rates charged by the licensee. Those rates are fixed by the New York State Public Service Commission and Section 19 of the Act expressly denies to the Federal Power Commission jurisdiction over such matters where as here the State has provided a commission for that purpose.

Furthermore, the effect of the Commission's action is to diminish the value of Respondent's property and assets—and thus the equity of its stockholders—by requiring it to accrue into amortization reserve, as "surplus" or "excess" earnings, amounts which in the one case it never received as project revenues, and which in the other case it in fact has already paid out under a valid and subsisting contractual obligation. The present effect is to reduce Respondent's corporate surplus and earnings available for dividends and other corporate purposes by $399,000 as of December 31, 1946; and the potential effect, over the remaining years of the license period, may amount to a substantial additional reduction. This injury to Respondent and its stockholders is no less important because Petitioner has chosen to ignore it.

Thus the end result of the Commission's action is to deprive Respondent and its stockholders of their property without due process of law, contrary to and in violation of the Constitution of the United States and the Fifth Amendment thereto. There is no claim here that property was taken for a public purpose within the meaning of the Fifth Amendment; but private property has been destroyed without compensation, and such a destruction is not permitted by the Fifth Amendment.

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CONCLUSION

For the above reasons the judgment of the Court below should be affirmed.

Respectfully submitted,

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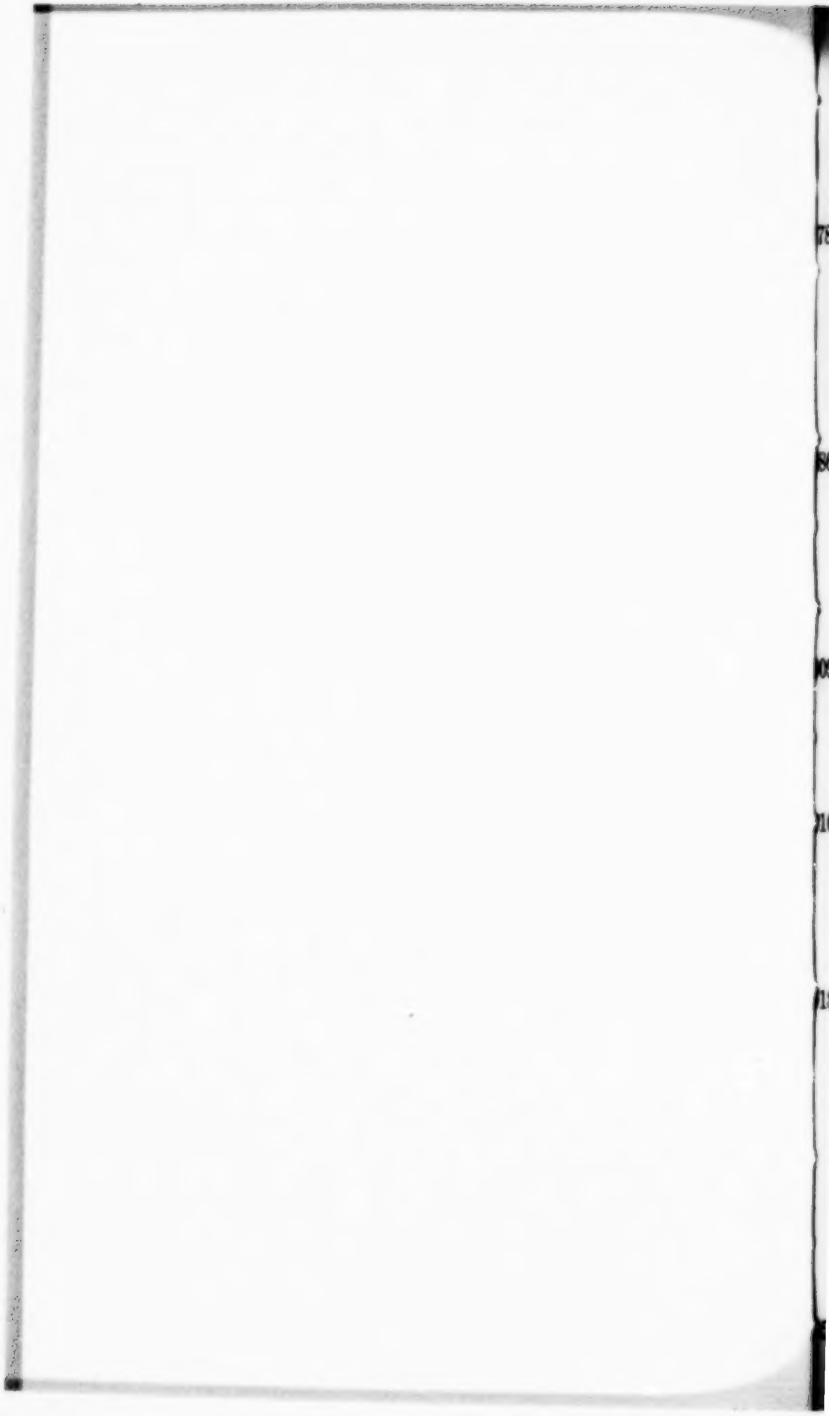
October, 1953.



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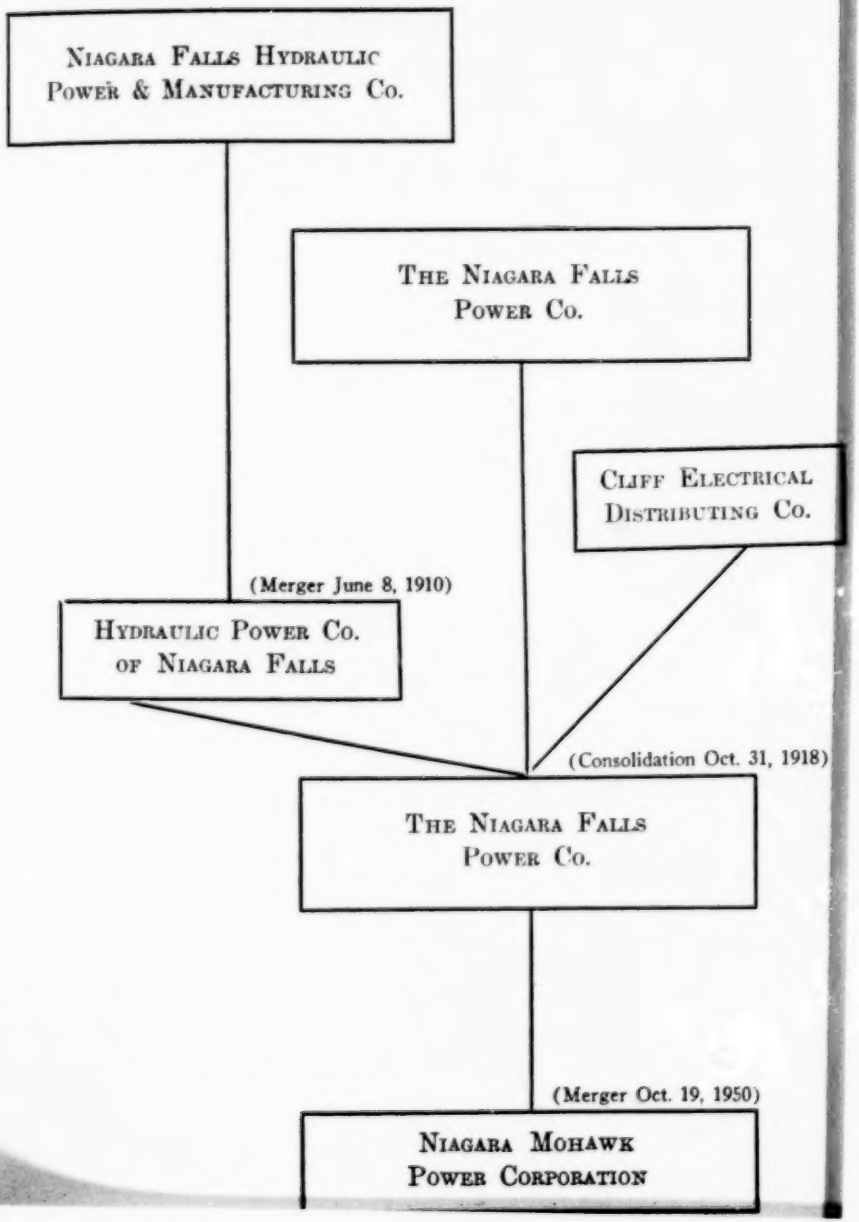

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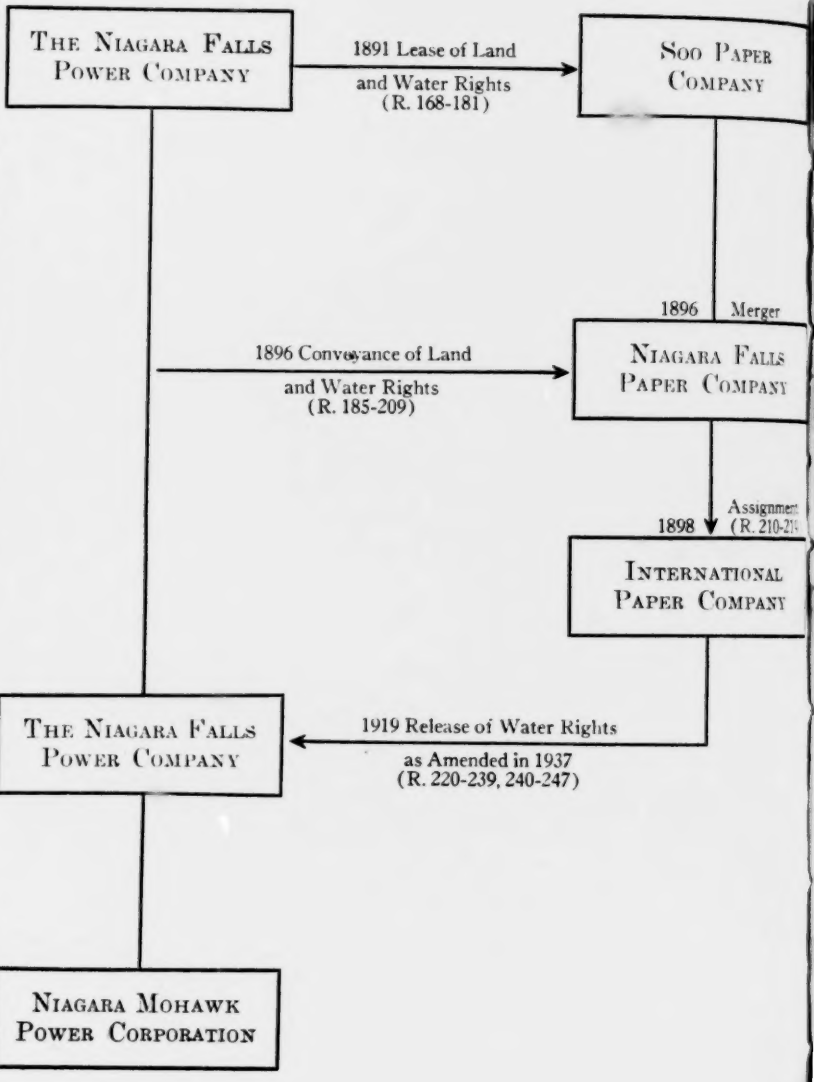

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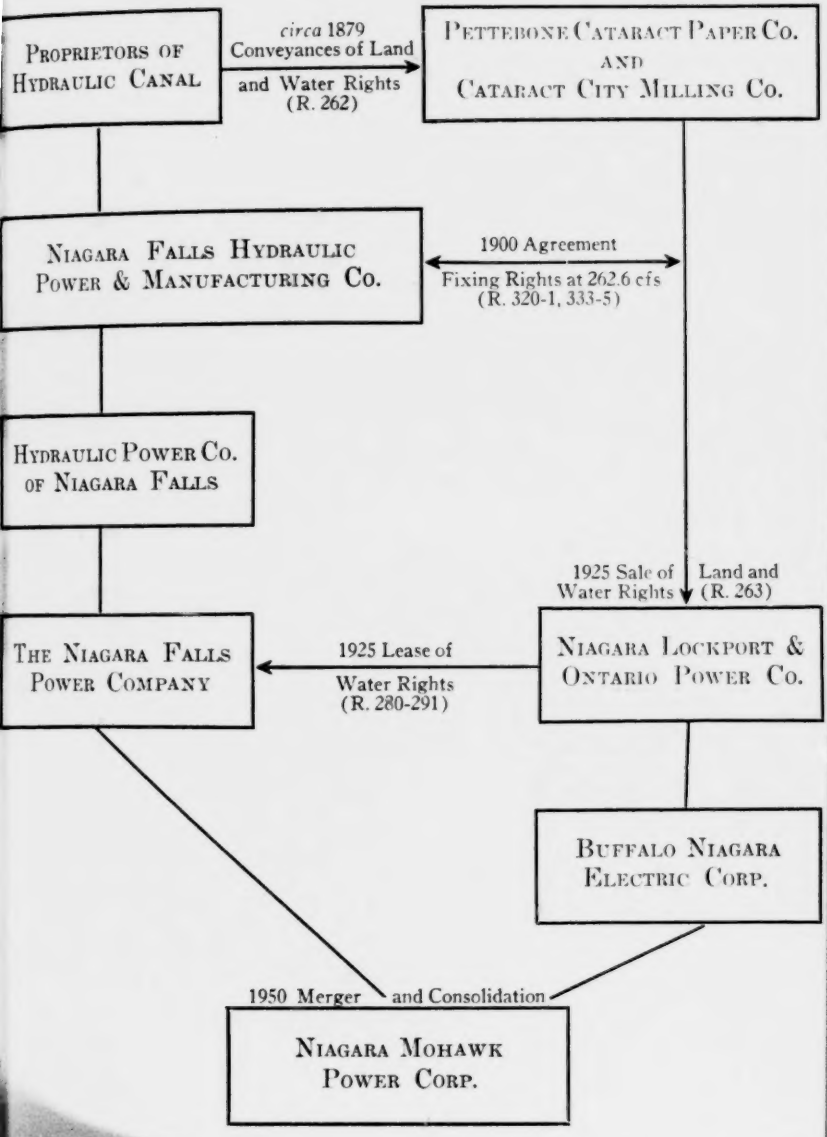

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HAROLD B. WILLEY, C

No. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL POWER COMMISSION,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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No. 28

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Petitioner,

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NIAGARA MOHAWK POWER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Jurisdiction

This Court has issued a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, remanding, with instructions to modify, an order of the Commission issued September 27, 1950.

This brief is submitted by the State of New York as *amicus curiae* in accordance with the provisions of Rule 27(9) of the Rules of this Court in order to set forth the views of the State of New York upon questions of title to water rights in the Niagara River.

Authority is vested with every right and power of the State, whether proprietary or sovereign, in the Niagara River. (Laws of 1951, ch. 146.)

The United States Senate ratified the treaty of February 27, 1950 on August 9, 1950 but approved a reservation that "no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress". Bills have been introduced which contain a finding that "it is most desirable that development of hydro-electric projects be made by private enterprise * * *", and which direct the Federal Power Commission to issue a license as soon as practicable "to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of any State * * *" (H. R. 2289, H. R. 4351 and S. 689).* These bills depart from the policy of the Federal Power Act which grants a preference to applications by States (Section 7), and from the policy of the State of New York for public development of hydro-electric resources.

Although the State is not a party to this proceeding and would not be bound by it, the State desires to call the attention of the Court to the nature of its rights in the waters of the Niagara River.

Statement

The State of New York owns the bed of the Niagara River and the American bank of the river from the Chippewa-Grass Island Pool above Niagara Falls to the Maid of the Mist Pool below. The State also owns the

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* Bills have also been introduced providing for development by the State of New York (S. 1971, H. R. 5335) and returning full jurisdiction to the Federal Power Commission (S. 2599).

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islands in the Niagara River on the Fall's edge. Therefore the entire fall of water which is the subject of controversy here flows in its natural condition, across, over, between and along lands owned by the State of New York.

No private owner has ever held title to the bed of the river. The banks of the river were acquired in the name of the State by the Niagara Reservation Commission created in 1883 (Laws of 1883, Ch. 336). The lands were thereafter set aside in perpetuity for park purposes (Laws of 1885, Ch. 182). The first steps by the Federal Government to protect the Falls came in 1906 (Burton Act, 34 Stat. 626).

The water rights purchased by the respondent consist of rights to divert waters upstream from the Falls and to discharge waters below the Falls thereby depriving the State Reservation of the full flow of the River in its natural condition. A sketch showing the geographic relationship of these diversions and the Falls appears at page 491 of the record.

The fall of water thereby diminished is valuable to the State Reservation. Under the statute the Niagara Reservation Commission was to acquire lands "for the purpose of preserving the scenery of the Falls of Niagara and of restoring the said scenery to its natural condition" (Laws of 1883, Ch. 336). As the Commission has reported, "the land of the Reservation was purchased by the State only as a setting for the Falls of Niagara" (29th Annual Report of the Niagara Reservation Commission, p. 66). On another occasion the Commission called the attention of the State Legislature to "the manifest inconsistency of * * * schemes to make use of * * * the water power of the Falls, for manufacturing purposes" (6th Annual Report, p. 58).

The International Paper Rights

The International Paper Company's rights derived from a contract with a company first formed three years after the establishment of the State Reservation (Laws of 1886, Chap. 83). Apparently the new company first proposed to exploit the Falls itself. As the Reservation Commission put it—

> "Defeated in the attempt to erect power works immediately under the Falls, enterprising promoters soon devised a plan of evading the uncompromising position of the Reservation Commissioners by taking water from the Niagara River above the Reservation and conducting it by subterranean tunnel to the river below the Falls, utilizing its power in transit." (19th Annual Report, p. 67)

We shall show that the new company had no right as a riparian owner upstream from the Falls to deprive the State Reservation of waters by draining these waters into a new channel, since the State, irrespective of its sovereignty, had a proprietary right to the full flow of the river in its natural condition. The company, however, did not rely on its riparian rights but sought a grant of authority from the State Legislature. Its charter was several times amended (Laws of 1889, Chap. 109; Laws of 1891, Chap. 253; Laws of 1892, Chap. 513; Laws of 1893, Chap. 477). The 1891 Act permitted the construction of works upon lands in the River. The 1892 Act permitted diversion of an amount of water sufficient to produce 200,000 effective horse power.

The respondent has failed to show that it had any riparian rights to make this diversion. Its rights derive from the grant from the State of New York which, as we shall see, could amount to no more than a temporary permit or license.

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Furthermore it appears both in the initial lease (169) and diagram (183) and the deed of 1896 (185-186) that essential works were constructed on land under water which belonged to the State of New York. The Legislature never granted and could not grant an indefeasible title to these lands under water. At most it could permit their use on a temporary basis.

The rights amounted in substance to an agreement by the promoters of the Niagara Falls Power Company to divide up the privileges conferred on a temporary basis by the State of New York.

The Pettebone-Cataract Rights

The Pettebone-Cataract diversion commenced some years before the acquisition of the State Reservation. The various conveyances upon which these rights depend are not in the record. Like the International Paper diversion it resulted in depriving the Niagara Falls and the State Reservation of the full flow of water.

Whatever proprietary rights may have existed were destroyed by the State's condemnation of the bank of the Falls in 1885. The State thereby acquired not merely the Reservation itself but "all water rights * * * easements and appurtenances of every name and nature whatsoever" and had the usual right of a riparian owner to the full flow of the stream in its natural condition.

In 1895 the Niagara Reservation Commissioners requested the opinion of the Attorney General of New York as to whether the Hydraulic Company (which carried water by canal to the Pettebone-Cataract Mills) could increase its diversion, then estimated at about 200,000 cubic feet per minute (3333 cfs) as compared with the 6,500 cfs later authorized under the Burton Act. (484)

The Attorney General ruled as follows:

> "The objects and purposes of the statutes creating the Niagara Reservation were to preserve a great natural waterfall and its environments for the enjoyment of the people of this State. In fact, the statutes themselves declare that the commissioners shall take all proper steps to restore, and afterwards to preserve, the scenery as nearly in its natural state as possible. The flow of water over the falls is an essential element in the preservation of the scenery, and if it can be shown (as I am informed it can be) to be the fact that the diversion of the large quantities of water through the canal of the Niagara Falls Hydraulic Power and Manufacturing Company has a diminishing effect upon the flow of the water over the falls, the diversion is a nuisance and can be restrained." (1895 Op. Atty Gen. pp. 328-329)

A few months later the New York Legislature adopted an act (Laws of 1896, Chap. 968) permitting the Hydraulic Company to divert such quantity of water as might be drawn through a canal 100 feet wide and 14 feet deep.

Here, again, the source of the rights was the legislative grant and not the ownership of riparian lands. Under the law of New York these grants are revocable at will and constitute at best a temporary permit to use waters to which the State retains the full proprietary title.

Subsequent Enactments

At the same session of the Legislature which authorized the diversion of the Hydraulic Company, a Senate resolution was passed as follows:

> "Whereas, The State of New York acquired at considerable cost the property known as the State Res-

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ervation at Niagara, and by legislative enactment decreed that it should 'forever be reserved by the State for the purpose of restoring the scenery of the Falls of Niagara to and preserving it in its natural condition,' and some have apprehensions that diversion of the waters of the great lakes and those of the upper Niagara river may injuriously affect the sublimity of the Falls; therefore be it

"Resolved, That the Government of the United States be requested to initiate such proceedings as may be deemed expedient to secure the permanent exemption of the great lakes and upper Niagara river from such diversions, and to regulate the use of the waters of the lakes and their connecting waters and those of the St. Lawrence river so far as they are international boundaries." (21st Annual Report of the Niagara Reservation Commission, p. 179)

On March 17, 1904, the New York Senate adopted the following resolution which was subsequently adopted by the Assembly

"Whereas The grants of water power at Niagara Falls heretofore made by Canada and the State of New York, have established a policy in relation to the waters of the Niagara river, the indiscriminate pursuit of which may seriously impair, if not destroy, the beauty of this wonder of nature;

"Whereas, There can be no adequate protection of the Falls against injurious grants, except from the united action of the United States and Great Britain.

"Resolved, (if the Assembly concur) that this legislature memorialize the President of the United States. to open negotiations with Great Britain, for the purpose of framing a treaty which shall prevent the diversion of wate s in the Niagara river, injurious to Niagara Falls as they now exist." (Id. pp. 179-180)

Two years later the Burton Act was enacted by Congress (Act of June 29, 1906, 34 Stat. 626). Ths act limited the American diversions from the Niagara River for power purposes to 15,600 Cfs. Predecessors of the respondent were issued permits by the Secretary of War in the total amount of 15,100 Cfc (484).

Thereafter the United States and Great Britain entered into the Boundary Waters Treaty of 1909. This treaty provided that—

> "So long as this Treaty shall remain in force, no diversion of waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.
>
> "The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.
>
> "The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second." (Art. V, 442).

It is clear that the Burton Act and the Boundary Waters Treaty of 1909 were not intended to confirm private rights in the Niagara River or to destroy the rights of the State of New York in the Niagara River. The purpose was to prevent the impairment of the beauty of Niagara Falls by excessive diversion of water for power purposes. The Burton Act specifically provided that—

> "Nothing herein contained shall be held to confirm, establish, or confer any rights heretofore claimed or

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exercised in the diversion of water or the transmission of power." (418-19)

The Treaty did not confirm any diversions but simply stated that a contracting party "may authorize and permit" diversion. Moreover a specific reservation of the existing rights of state and provincial governments was contained in Article II thereof—

> "Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters."

Since the State of New York had undertaken to preserve the Falls in its natural condition, and had invested the money required for that purpose these measures should be interpreted as additional sanctions for the protection of the State's interest and not as devices to destroy it.

The necessity of the Treaty is particularly evident. The existing diversions on the Canadian side, as the Treaty indicates, were almost twice those on the American side. Moreover, the American Falls has greater need of the full flow of the river since it receives only 1/10th of the stream as compared with the 9/10ths passing over the Horseshoe Falls adjacent to the Canadian shore. (See: Joint Hearings before the Subcommittee on Flood Control and Rivers and Harbors of the Committee on Public Works of the United States Senate and the Committee on Public Works of the House of Representatives, 83d Cong., 1st Sess., on S. 689, H. R. 2289 and H. R. 4351, p. 16). Even this small proportion was obtained by constructing

a submerged weir during the years 1942-1944 which nearly doubled the flow (See: *Possibilities for Redevelopment of Niagara Falls for Power,* Bureau of Power, Federal Power Commission, 1949). The Burton Act limited the extent to which the State, as proprietary owner, or its permittees, could divert waters for power purposes. It did not purport to vest any proprietary right in the United States. The Treaty imposed similar limits on both American and Canadian Authorties. It did not purport to affect any proprietary title.

Shortly after the Burton Act was passed, Governor Charles Evans Hughes, in a message to the New York State Legislature, said that the water power of the State "should not be surrendered to private interests but should be preserved and held for the benefit of the people." The Legislature thereupon enacted Chapter 569 of the Laws of 1907 which directed the State Water Supply Commission, then only a year old, "to devise plans for the progressive development of the water powers of the State under State ownership, control and maintenance for the public use and benefit and for the increase of public revenue." (First Annual Report of the Power Authority of the State of New York, 1931, p. 43.)

During the following decade the formulation of a State water power policy was a matter of continuing controversy and a series of legislative committees and commissions considered the matter. A Joint Legislative Committee was appointed in 1912 to investigate the entire question. It reported to the Legislature as follows:

> "Your committee hesitates to recommend any specified policy to be adopted by the State in connection with the development of its water powers without further investigation. Having in mind, however, that previous committees of the Legislature, public officials and commissions have recommended such development by and in behalf of the State itself, and that the

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> Legislature of the State has heretofore expressed its approval, your committee feels that this should be the established policy, and that it should be forcefully and fearlessly carried out * * *." (*Id.*, p. 44)

During the First World War certain changes in the utilization of existing Niagara diversions were made at the instance of the Secretary of War, including the termination of the International Paper rights involved here. In connection with these changes Cliff Electrical Distributing Company, The Niagara Falls Power Company and Hydraulic Power Company of Niagara Falls agreed to consolidate and to make better use in joint operation of their existing diversions. Acts of the New York Legislature were sought to authorize this consolidation. (Laws of 1918, Chapters 596 and 597). These acts contained the following proviso:

> "Nothing in this act shall be construed to waive or eliminate any right now vested in the state as to waters now being diverted by any of such corporations so consolidated, or to compensation for said rights." (408)

The Burton Act was extended by the Congressional Joint Resolutions of August 22, 1911 (37 Stat. 43) and April 5, 1912 (37 Stat. 631). On January 19, 1917 Congress passed the first of several joint resolutions authorizing the Secretary of War to issue permits for the diversion of water from the Niagara River (39 Stat. 867). This resolution was extended on June 30, 1917 for a year (40 Stat. 241) and on July 29, 1918 for a further year (40 Stat. 633) and again on July 12, 1919 for an additional year (41 Stat. 163). The last such resolution contained an express proviso:

> "That this resolution shall remain in force until the 1st day of July 1920, and no longer, at the expira-

tion of which time all permits granted hereunder shall terminate, unless sooner revoked, or unless the Congress shall before that date enact legislation regulating and controlling the diversions of water from the Niagara River, in which event this resolution shall cease to be of any further force or effect." (469)

On June 10, 1920, the Federal Water Power Act became law. Here, again, Congress specifically provided:

> "The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted, *or as confirming or otherwise affecting any claim,* or as affecting any authority heretofore given pursuant to law * * *." (Sec. 23 (a))

The words italicized above were added on motion of Senator Wadsworth of New York who described the purpose of his amendment as follows:

> "I have a difficult situation in mind * * * the Niagara Falls situation. It so happens that the rights those companies received there years and years ago, * * * came as grants from the State of New York; and those companies—rightly or wrongly, I do not know which—have claimed, or have indicated that they might claim, certain continuing rights to the diversion of water and the generation of power. It might be said that that claim has been a constantly pending one, but it never has been settled. The Niagara situation always has been uncertain as to its future for that reason. Now, I do not want this bill in any way to confirm that claim. (59 Cong. Rec. 1482)."

Section 9(b) of the Federal Water Power Act also provided that each applicant for a license shall submit:

> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the

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State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this Act."

On March 5, 1923 Governor Alfred E. Smith transmitted a message to the New York Legislature recommending a policy of State development of the power resources of the Niagara and St. Lawrence rivers. He stated that:

"While we have been debating and bickering over the enactment of laws for the progressive development of our great water power under State ownership and control the Federal Government has enacted a Water Power Law which challenges our right, authority and jurisdiction over the navigable waters of our State in all matters relating to power development."

He further recommended that an appropriation be made available to the Attorney General to defray the expenses of an action begun by the State against the Federal Government. (Public Papers of Governor Alfred E. Smith, 1923, pp. 138-141.)

Governor Smith appointed a committee on behalf of the Water Power Commission of the State of New York. On May 10, 1923 a conference was held by this committee with interested Federal officials, including the Secretary of the Interior, the Secretary of Agriculture and representatives of the Federal Power Commission, the Secretary of War and the Solicitor General of the United States. On July 16, 1923, the Committee reported to the Governor on its conference and recommended that the suit be withdrawn in view of assurances obtained from the Federal Power Commission. The remarks of the conferees construing sec-

tion 9(b) were as follows:

"We directed a number of inquiries to the Commission involving its construction of this section. Mr. Saxe, at one point, asked the Commission what its position would be if the New York Commission should grant one application to 'A', and a contestant 'B' then made application to the Federal Commission, would the latter have jurisdiction to grant a license to B instead of to A? Mr. Merrill [Executive Secretary of the Federal Power Commission] answered this question as follows:

Mr. Merrill: 'In the first place, it could not be granted to anyone who had not complied with the requirements of Section 9b of the Federal Act. Assume that only A had done this. The Commission would, nevertheless, under the Act, have authority to say that it will not issue a license to A because it is not satisfied with A's plan.'

Mr. Griffin [Deputy Attorney General of New York]: 'You would not regard it as unreasonable to grant a license to Company B?'

Mr. Merrill: 'They must have such authority from the State as is comprehended within section 9 of our Act,—the right to occupy beds and banks and divert the water, and the right to engage in the work of developing power."

Mr. Griffin: 'They must have first, a license from the State Water Power Commission, and second, satisfactory plans?'

Mr. Merrill: 'If the license from the State covered those items named in the Act.'

Mr. Griffin: 'As I take it, the worst situation that could possibly arise is that there would be a deadlock * * * You would not presume to have authority to settle it for the State over the head of the

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State of New York, and, on the other hand, the State of New York could not settle the question without the approval of your Commission. That is about the substance of it?'

Mr. Merrill: 'Yes * * * I think it would be advisable for the two agencies to confer before acting. That is what we are working for in each of the States'." (Public Papers of Governor Alfred E. Smith, 1923, p. 562, quotations based upon a stenographic record.)

The State Water Power Commission referred to by Mr. Griffin was created under the State Water Power Act of 1921 (now Article XIV of the Conservation Law), which was patterned generally on the Federal Water Power Act of 1920. During the five years following its creation a series of applications by private companies for permission to utilize the State's water power resources were made, notably, an application by The Frontier Corporation for permission to construct power works in the St. Lawrence River. The Frontier Corporation was controlled by interests including The Aluminum Company of America, General Electric Company and The E. I. DuPont de Nemours Company. Ultimately The Frontier Corporation withdrew its application and the State Water Power Act was amended to provide that all licenses issued by the Water Power Commission must be approved by the Governor.

On January 1, 1929, Governor Franklin D. Roosevelt discussed the State water power policy in his Inaugural Address as follows:

"First, it is agreed, I think, that the water power of the State should belong to all the people. There was, perhaps, some excuse for careless legislative gift of power sites in the days when it was of no seemingly great importance. There can be no such excuse now. The title to this power must vest forever in

> the people of this State. No commission, no, not the Legislature itself, has any right to give, for any consideration whatever, a single potential kilowatt in virtual perpetuity to any person or corporation whatsoever." (First Annual Report of the Power Authority of the State of New York, 1931, p. 46)

In February, 1929, the Niagara Falls Power Company, with a view to eliminating the opposition of the State to its efforts to secure additional water diversion at Niagara, entered into an agreement with the State of New York stipulating that it would:

(1) Withdraw all objections to the payment of the rental being charged by the State for existing water, and

(2) Agree to pay such equitable rental for the additional experimental supply as might be determined by the State under the Water Power Act, and

(3) Recognize the necessity of obtaining a license from the State for the use of the experimental water (Id., p. 47).

As described by Governor Roosevelt in a letter to United States Senator Robert F. Wagner, February 9th, 1929:

> "This is a complete recognition of the right and sovereignty of the State of New York to license and rent all water now being used by the company and all wate to be used under the provisions of the convention ana protocol * * *. The stipulation received by the State of New York clears up the matters long in dispute between it and the private company and makes it perfectly clear that the State has the full sovereignty and control over the water on the American side of the Niagara River for all time." (Id., p. 47)

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In 1931 the Legislature enacted the Power Authority Act (Laws of 1931, Chap. 772, now Article 5, Title 1, Public Authorities Law) which declared the St. Lawrence River and its watershed a natural resource of the State and created a public authority charged with the duty to "proceed with the improvement and development of the international rapids section of the St. Lawrence river * * * for the aid and benefit of commerce and navigation and for the development of the hydro-electric power inherent therein."

Thereafter Governor Roosevelt and the Power Authority had negotiations with President Hoover, the State Department and the Army Engineer Corps, which resulted in the so-called Federal-State Accord on February 7, 1933. This provided generally that in any program for development of the St. Lawrence River the State of New York would be responsible for hydro-electric power works and the Army Engineers for navigation works and prescribed a formula for the distribution of costs between the two. The Accord was submitted to the Senate on February 10, 1933. A joint resolution approving the Accord was introduced in the House of Representatives and adopted by the House on April 26, 1933 after public hearings.

Although the navigational works have not yet been approved by the Congress, the Federal Power Commission has granted a license to the New York Power Authority permitting it, in conjunction with the Ontario Hydro-Electric Commission, to construct the hydro-electric works in the St. Lawrence River (F. P. C. Project No. 2000).

The State Power Authority was not charged by law with any duty with respect to the Niagara River in 1931 because at that time all diversions authorized by the 1909 Treaty were under private license. However, the State gave notice that it wished to utilize any additional water which might be made available from the Niagara. Its representatives participated in the Niagara studies by the Federal Power

Commission (*Possibilities for Redevelopment of Niagara Falls for Power Purposes,* Bureau of Power, Federal Power Commission, 1949, pp. 1, 3) and acted as consultants in the negotiation of the Treaty of 1950. (*Annual Report of the Power Authority of the State of New York,* 1949, p. 40.) Although the State has never undertaken to cancel its grants of authority for present Niagara diversions it asserted its title by collecting a rent for the use of the State's waters in the Niagara River. A rental of $400,000 per annum was collected on the excess over 15,100 second-feet as a condition to the consolidation permitted under the Statute of 1918. In 1943 the Legislature authorized the Water Power and Control Commission of New York State to fix a rental on the basic diversion of 15,100 second-feet effective July 1, 1943. (L. 1943, ch. 46; Conservation Law § 614 (13).) An additional rental of $700,000 per annum was fixed and has been collected ever since upon the basic 15,100 second-feet. This rental is reflected in the petitioner's accounts to the Federal Power Commission (39) and has not been challenged in this proceeding.

By the same statute the Legislature declared all waters, over which the State has proprietary ownership of the flow, subject to the power and control of the State "for the purpose of regulating, licensing, controlling or terminating the use and disposition of the same." Governor Dewey stated in approving this bill that—

> "In my Annual Message I expressed it as my hope that as one of the first acts of 1943 it shall be declared by law that the water power resources of the State shall be preserved for the benefit of the people in perpetuity. I also stated that now is the time to make that policy effective by legislation requiring a proper rental for water power use under previously existing authority.
>
> "The Legislature, by this bill, has acted in agreement with my recommendation." (McKinney's Cons. Laws of N. Y., Book 10, n. § 612)

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ARGUMENT

I

The Federal Power Act has not destroyed the rights of the states in navigable streams.

A long series of decisions by this court have expressly confirmed the rights of states of the United States to the use of waters of navigable streams. In *Martin* v. *Waddell,* 16 Pet. 367 (1842), this court stated:

> "For when the Revolution took place, the people of each State, became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution of the general government." (p. 410)

In passing upon the point the court took express notice of the distinction between sovereign and proprietary rights and rights to the soil and the waters, when it stated that the questions were—

> "Whether the dominion and propriety in the navigable waters and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the duke." (p. 411)

In *Pollard's Lessee* v. *Hagen,* 3 How. 212 (1845), the court passed upon the rights of States admitted to the Union after the Revolution. The lands concerned were ceded to the United States by the States of Virginia and Georgia and by the Treaty with the French Republic of April 30, 1803, ceding Louisiana. The court stated:

> "We think a proper examination of this subject will show that the United States never held any

> municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed, except for temporary purposes * * *." (p. 221)

Alabama was admitted into the Union pursuant to a compact which provided "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefore imposed by the said State." The court construed this provision as intended to effectuate the powers granted to Congress under the Constitution "to regulate commerce with foreign nations and among the several States." The court concluded:—

> "This supposed compact is, therefore, nothing more than a regulation of commerce to that extent among the several States, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it." (p. 230)

The principles applicable to inland waters are equally applicable to boundary waters. In *Massachusetts* v. *New York*, 271 U. S. 65 (1926) this court held that the State of New York owned the bed of Lake Ontario within the international boundary.

We do not understand that the Solicitor General here claims that Congress obtained any powers of regulation by virtue of the Boundary Waters Treaty of 1909 beyond those already delegated to it by the Constitution.

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Aside from possible constitutional limitations on the power of Congress which we will not labor, this case presents the question whether Congress has exercised any power to take inland navigable waters from the States. The dissenting opinion in the court below suggests that this taking was accomplished by the Federal Water Power Act of 1920. The Federal Power Commission in its statement of questions presented and specifications of error also relies on the Federal Water Power Act of 1920 to accomplish the supersedure.

The State agrees with the decision of the court below that State laws relating to the use of water power are not superseded but are supplemented by the Federal Power Act.

The State takes no position on the question whether payments to private corporations for water rights are legitimate operating expenses for the purpose of computing amortization reserves. The State contends that it is the sole owner of proprietary rights to the use of waters of the Niagara River and that waters of the river cannot be diverted without its consent whether by license from the Federal Power Commission or otherwise. It regards the Federal Power Act as an assertion of federal regulatory authority under the power "to regulate commerce" and not as the taking of the State's water rights.

There is no language in that Act which supports the conclusion that a taking was intended. We shall point out at a later point in this brief that there are many provisions which indicate the contrary. However, before proceeding to analyze the language of the Act, we shall summarize briefly its history and the legislation which preceded it, because we believe this history makes it entirely clear that the act was not intended to take proprietary rights in navigable waters from the states to vest them in the Federal Government.

Prior to 1899 the Congress of the United States had not asserted any general authority over navigable rivers in the United States. The diversions of water for power purposes from the Niagara River were made pursuant to temporary permits granted by the Legislature of the State of New York and no Federal authority was sought or required for these diversions. In 1899 Congress enacted a general law requiring that a permit be obtained from the Secretary of War before placing an obstruction in any navigable body of water in the United States (Act of March 3, 1899, 30 Stat. 1121, 1151).

The effect of the 1899 statute upon the laws of New York is discussed by Mr. Justice Holmes in *International Bridge Co.* v. *New York,* 254 U. S. 126 (1920), as follows:—

> "The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the State. It is said that the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us.—The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by

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the State, still the foundation of a right to use the land at all must be laid by state law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built 'in pursuance of' the New York statutes.

* * * * *

"But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant." (pp. 131-133)

This case dealt with the waters of the Niagara River. This construction of the 1899 statute was reaffirmed by this court in *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138 (1933) in a unanimous opinion.

In 1901 Congress enacted a law (Act of February 15, 1901, 31 Stat. 790, Chap. 372) pursuant to which the Secretary of the Interior granted revocable permits to occupy public lands including the forest reserves.

Under these two statutes, the law of 1899 applying to navigable streams, and the law of 1901 applying to public lands, a power developer could, so far as the Federal Gov-

ernment was concerned, occupy navigable rivers or public lands for the production of power. However since the permits granted both by the Secretary of War and the Secretary of the Interior were revocable, such an occupation was at the risk of a subsequent assertion of Federal authority. Therefore, many power developers sought acts of Congress permitting such occupation in the apparent belief that a congressional permit was irrevocable or at least less readily revocable than one obtained from the appropriate administrative officer.

There was no further general legislation until the General Dam Act of 1906, which again required the consent of Congress before a dam could be constructed in a navigable water. It also required the approval of the project by the Secretary of War and Chief of Engineers, required the grantee to maintain locks, works and other structures which might be required by the Secretary of War and Chief of Engineers, and required the grantee to furnish power for such works and to establish such fishways as the Secretaries of Commerce and Labor might require. In 1908 Congress consented by act to the construction of a dam across the Rainy River. President Roosevelt vetoed this act in a message sent to Congress on April 3, 1908 (42 Cong. Rec. 4698) in which he specified the following conditions, which, in his opinion, should be placed in every grant for the construction of dams across navigable waters:

> "First. The grant should be annulled if the work was not begun and plans carried out in accordance with the authority granted.
>
> "Second. The proper official should see that in approving the plans the maximum development of navigation and power was assured.
>
> "Third. There should be a license fee or charge which, although small and nominal at the outset, could be adjusted in the public interest.

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"Fourth. There should be provision for the termination of the grant at a definite time, leaving the future to determine its course."

In 1909 President Roosevelt again insisted on these conditions in a message vetoing a bill to authorize the construction of a dam across the James River in the State of Missouri (H. R. Doc. 1350, 60th Cong. 2d Sess.).

In 1910 Congress amended the General Dam Act to incorporate some of the provisions insisted upon by President Roosevelt in his veto message.

The 1910 Act went further than the 1906 Act in providing for a comprehensive plan for the development of a river and waterway system and for the consideration of each particular project with a view to the over-all plan of development. It also provided for the termination of grants at the end of fifty years after the approval of projects but did not make any provision for reimbursing licensees for their investments. Those provisions did not prove attractive to developers and a total of only eight dams were constructed under the provisions of the General Dam Acts of 1906 and 1910. (H. Rept. No. 61, 66th Cong., 1st Sess.)

The Federal Water Power Act of 1920 was in form not an original act but an amendment of the General Dam Act of 1910. It was intended to establish a general policy for the authorization of power projects in the United States and to transfer the burden of passing on such projects from the Congress to an administrative body.

The body selected consisted of the Secretary of War, The Secretary of the Interior and the Secretary of Agriculture. These three officials were chosen because the Secretary of War had formerly granted revocable permits in navigable streams, and the Secretary of the Interior had

granted revocable permits in public lands. Where lands of the forest reserve were occupied the permit was also granted by the Secretary of the Interior but was required to be in conformity with administrative regulations of the Secretary of Agriculture, who had general regulatory authority over the forest reserve.

The Act empowered the Commission to issue licenses for the construction of works in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce, or upon any part of the public lands and reservations of the United States, or for the purpose of utilizing surplus water or water power from any government dam (Sec. 4(e)). In other words, it combined jurisdiction already asserted under the 1899 Act and 1901 Act.

The Act, therefore, did not mark a substantial departure from previous congressional policy and administrative practice. It merely combined in one agency the licensing and regulatory powers previously exercised by the Secretaries of War, Interior and Agriculture, gave those officers power to issue licenses for a definite term of fifty years, and elaborated the conditions and requirements upon licensees to stimulate investment and to protect the public interests.

The question of the effect of previous legislation and the Federal Power Act itself upon state proprietary rights was one which was repeatedly discussed and referred to, not only in the veto messages of the presidents but also in the debates of Congress. President Roosevelt explained the sources of congressional power in his veto message on the James River Dam (H. R. Doc. 1350, 60th Cong., 2d Sess.), as follows:

> "My reason for believing that the Federal Government, in granting a license to dam a navigable

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river, has the power to impose any conditions it finds necessary to protect the public, including a charge and a limitation of the time, is that its consent is legally essential to an enterprise of this character. It follows that Congress can impose conditions upon its consent."

President Taft, in a veto message relating to the building of a dam across the Coosa River in Alabama on August 24, 1912 (S. Doc. 949, 62d Cong., 2d Sess.), stated:

"It is said that the grantee, the Alabama Power Co., proposes to spend over a million dollars in the construction of a dam, as well as to furnish toward the project its riparian rights and to stand the expense and cost of the damages by flowage. It is manifestly entitled to be credited for all these expenditures, and is manifestly entitled to a fair, full, and reasonable profit for its investment and work. But after all of these items are fully allowed for it is equally manifest that in the course of time the return from the privilege thus granted in the shape of valuable water power created may far exceed a reasonable return for these items." (pp. 1-2)

During the administration of President Roosevelt, President Taft, then Secretary of War, submitted a report to Congress which declared:

"The Federal Government has no possessory title to the water flowing in navigable streams, nor to the land comprising their beds and shores, and hence Congress can grant no absolute authority to anyone to use and occupy such water and land for manufacturing and industrial purposes. The establishment, regulation, and control of manufacturing and industrial enterprises, as well as other matters pertaining to the comfort, convenience, and prosperity of the people, come within the powers of the States, and the Supreme

> Court of the United States holds that the authority of a State over navigable waters within its borders, and the shores and beds thereof, is plenary, subject only to such action as Congress may take in the execution of its powers under the Constitution to regulate commerce among the several States." (Quoted in *First Annual Report of the Power Authority of the State of New York,* 1931, p. 84.)

It is noteworthy that neither President Roosevelt nor President Taft claimed on behalf of the Government any proprietary rights in navigable waters of the United States. The argument was simply that the waters could not be utilized without the consent of the Federal Government and that it was the duty of the Federal Government to attach conditions to its consent. President Taft agreed that developers were entitled to compensation for riparian rights contributed to a project but felt that the United States should protect against profits which exceeded a reasonable return on such contribution.

In the congressional debates on the Water Power Act two questions more than any other occupied the attention of the Senate and House. The first such question was the provision for payment upon repurchase at the expiration of a license (Sec. 14), and the second question was the amount of annual charge to be paid to the United States by a licensee (Sec. 10). The Act finally adopted retreated from the positions previously taken by the Presidents and the General Dam Act of 1910 on both these points.

In debate, Representative LaFollette, speaking for a majority of the House Committee, defended the present net investment repurchase clause against supporters of the so-called Ferris Amendment. The repurchase clause supported by Mr. LaFollette ultimately carried and is one of the clauses now before the Court. Representative LaFollette made a lengthy statement in which he quoted a

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number of decisions of this Court in support of the proposition that under the act the States retained full proprietary rights, control and authority over their navigable waters.

At one point he described compliance with Section 9(b) as a condition precedent to the procuring of a license in the following language:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion and use of water, we are most assuredly not infringing any States' rights in that respect, but are definitely insisting that the States' rules of property as to water, bed and banks, must have been fully complied with or license cannot issue."

At another point he said:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we, as representatives of the States, have authority to act for the States in matters of this character. * * * Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests. * * *"

Again he said:

> "In this bill the State abrogates none of its powers or rights."

And at a later point—

> "Mr. Chairman, it might be better, as some men seem to think, if all jurisdiction as to water, bed and

> banks of streams was in the Federal Government instead of in the States. If it were so there would be no complication caused by conflicting authority. We, however, have to legislate under conditions as we find them."

Representative LaFollette's comments are annexed as an appendix to this brief. His statement shows that the net-investment repurchase clause was not based upon the theory that the United States owned water rights, but was intended to protect licensees. Under the General Dam Act of 1910, licensees were entitled to nothing at the expiration of the fifty years term, "leaving the future to determine its course." Under the Water Power Act the license continued unless the United States repaid the licensee for his net investment or issued him a new license on reasonable terms (Section 15). Section 15 in its present form was bitterly opposed in the Senate by conservationists (59 Cong. Rec. 1472-75) and Section 14 was opposed in the House of Representatives as too generous to the water power interests (H. Rept. 715, 65th Cong., 2d Sess., Minority Report, pp. 40-46).

When the Water Power Act was before the Senate an amendment was offered to the House bill by Senator Nelson speaking for a majority of the Senate Committee. This amendment limited the annual charges payable to the United States under Section 10(e) to an amount for the purpose of reimbursing the United States for the costs of administration. The bill then before the Senate provided for payment of "reasonable annual charges in an amount to be fixed by the Commission". Senator Nelson objected to the fixing of any charges beyond the cost of administration and posed the following question:

> "Why should the Federal Government charge the people of the States for the use of water which belongs to them, where the development is brought about by the capital of the people of the State?"

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and again—

> "Why should the people of the States be mulcted and made to pay to the Federal Government for property which the Federal Government does not own?
>
> "It cannot be said or denied by any legal authority of this country that, aside from the purposes of commerce and navigation, the use of the water in the several States belongs to the people of the States. If it belongs to the people of the States, why should the government take the property of the people of the States, sell it to them and make them pay for it?"

Senator Norris, answering Senator Nelson, said:

> "I am not going to enter into a controversy with the Senator from Minnesota on the proposition that the water does not belong to the Government of the United States: But I do contend that since the dams cannot be constructed and these water power propositions developed without the consent of the Federal Government, the Federal Government has a legal right and a moral right to grant the concessions on such terms as it may see fit." (59 Cong. Rec. 1431)

In other words, the position of the group led by Senator Norris was the same as that taken by Presidents Roosevelt and Taft, who, as we have seen, did not contend that the value of riparian rights should be disregarded, but believed that the United States could condition its consent to occupation upon the payment of an annual charge which would prevent the earning of excessive profits in the development of water resources. They did not propose to "wipe the slate clean" of riparian rights and regarded questions of title as irrelevant. They felt simply that licenses should be conditioned to prevent an excessive return. Even this view was rejected over and over again by the Senate. Four bills passed by the House

between 1914 and 1916 were defeated in the Senate "due to objections based largely on the ground that Congress has no right to exact a charge for the development of water power and with special reference to power developed on navigable streams" (S. Rept. 180, 66th Cong., 1st Sess., p. 5).

The Nelson Amendment was adopted by the Senate (59 Cong. Rec. 1572-73). The provision finally enacted was a compromise between that contained in the House bill and that urged by Senator Nelson. It provided for payment of reasonable annual charges for the purpose of reimbursing the United States for costs of administration and "for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization, as herein provided, is reached * * *" (Sec. 10(e)).

The provision finally adopted, therefore, accepted the prior right of the states to collect annual charges for the expropriation of excessive profits and provided for annual charges by the United States only where the states themselves took no action. The adoption of this amendment makes clear that the Congress considered that the states retained full proprietary rights in navigable waters and permitted the Federal Government to charge for the use of navigable waters only where the states had not asserted their right.

The Federal Power Commission quotes the statement of Senator Wadsworth regarding Section 23(a) of the Act (Commission brief, p. 47) in support of the proposition that the act was intended to destroy substantive rights under state laws.* Senator Wadsworth's statement was not intended for that purpose but to make clear that

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* The Commission quotes other statements of Senator Wadsworth in its brief at pages 41-42.

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rights asserted by the power company against the State of New York were not to be confirmed by the act. At another point in the debate, Senator Wadsworth discussed with Senator Norris the question of development of the St. Lawrence River, which was also under legislative license to a private corporation. Senator Wadsworth stated—

> "The Supreme Court of the United States, in a case having to do with this very place on the St. Lawrence River, has handed down a decision to the effect that these waters are held in trust for the people of the State of New York and that the Federal Government does not own the waters." (59 Cong. Rec. 1492)*

At a later point Senator Wadsworth contended that even the Federal Government itself could not construct power works in the St. Lawrence without the consent of the State. He stated:

> "I think from former experiments that you will find the attorney general of New York contending against the right of the Federal Government to interpose at all to stop them from developing it, once they get the permit to divert the water in such a way as not to disturb navigation. The State of New York, through its legal representatives, has never conceded ownership of the water in the Federal Government nor any of its control except in so far as that control was necessary to protect navigation. Governors and attorney generals have always said that under the Constitution of the United States, that water was held in trust for the people of New York." (59 Cong. Rec. 1492)

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* Senator Wadsworth may have referred to the decision of this Court in *Long Sault Development Co.* v. *Call*, 242 U. S. 272 (1916).

It is evident that Senator Wadsworth did not understand the act to supersede the laws of New York.

If the debate in the Senate is read in full it will be seen that on almost every amendment the conservationists led by Senator Lenroot were defeated and that the group led by Senator Nelson generally succeeded in retaining its amendments in conference with the House.

The debates in Congress are barren of any suggestion that the Federal Government has any proprietary right in the valuable waters belonging to the states. Despite the extensive discussion of this precise legal issue, nowhere does the act contain any language asserting a superior proprietary right in the United States. The act is regulatory in character and in most respects represents a retreat from, rather than an advance beyond, the positions taken by Presidents Roosevelt and Taft and prior regulatory enactments of the Congress.

The language of the act confirms this interpretation. Section 3(8) defines navigable waters as "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce." If Congress had intended to assert proprietary rights in navigable waters it would have done so here, but instead it referred merely to its power to regulate. Section 3, subdivision 11 in defining "project" includes therein "all water rights, rights-of-way, ditches, dams * * *" If Congress had believed that the only water rights in navigable streams were rights under its license it would have said so here. The fact that water rights are bracketed in the language of the act with rights-of-way, lands and interests in lands, again indicates that the Congress was fully aware of the fact that water rights were valuable assets under State law and did not intend to disturb them.

Section 9 (b) of the act provides that such applicant for a license shall submit to the Commission,

> "satisfactory evidence that the applicant has complied with the requirements of the laws of the State

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> or States within which the proposed project is to be located, with respect to bed and banks and to the appropriation, diversion and use of water for power purposes * * *"

As we have pointed out above, Representative LaFollette, who later suggested an amendment to this section adding the words "bed and banks," regarded this section as mandatory and as "one of the conditions precedent to the procuring of a license" (56th Cong. Rec. 9110).

This Court has held that Section 9 (b) does not require a licensee to conform to regulatory measures of a state, (*First Iowa Co-op* v. *Power Commission,* 328 U. S. 152) and has stated that Section 9 merely relates to securing adequate information for the Commission and does not itself require compliance with any state laws. However, the court has stated that state laws, relating to beds and banks of streams and to rights to divert or use water, remain effective in so far as they have not been superseded by the Federal Power Act (328 U. S. at 178).

At issue here is the question whether the Federal Power Commission can confiscate the proprietary rights of a state in its waters by licensing a private company to use the state's waters. The Commission, as we understand it, has taken the position that its license is the sole source of rights to use waters of the Niagara River. Implicit in that argument is the assumption that the Federal Power Commission can take usufructuary rights belonging to the State of New York without its consent and transfer them to private corporations. Nothing in the Act or in the holdings of this court justifies the conclusion that Congress intended or has the power to deal with the property of a state in this fashion.

Section 27 of the Act declared that—

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any

way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Section 3(9) of the Act provides—

"'Municipal purposes' means and includes all purposes within municipal powers as defined by the constitution or laws of the state or by the charter of the municipality."

The use of the word "municipal" in this broad sense follows the rule laid down in *Pollard's Lessee* v. *Hagan*, 3 How. 212, 230, where the court stated:

"This right of eminent domain over the shores and the soils under the navigable waters, for all *municipal purposes*, belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it." (Italics added)

Regardless of whether Section 27 is construed to protect private proprietary rights under state law, it clearly protects the proprietary rights of New York in the Niagara River.

Under the laws and public policies of the State the waters of the Niagara River are held in trust for the people of the State for recreation, power development and other public purposes. The New York Power Authority is described as a "corporate municipal instrumentality of the state" (*Public Authorities Law* §1002). Since 1895 the State has held title to the bed and banks at the Falls and has maintained the Niagara Reservation. Under these circumstances the laws of the State relate to municipal purposes and are expressly saved from supersedure by the Act. This court has heretofore ruled that water rights

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in the Hudson River, another New York navigable-in-law stream, were expressly saved by Section 27. *Ford & Son* v. *Little Falls Co.,* 280 U. S. 369 (1930).

The Commission attempts to avoid the provisions of the Act by asserting that its licensees are agents of the United States. (See Point I B of the Commission's brief, p. 25.) This argument ignores the unanimous decision of this court in *Broad River Power Co.* v. *Query,* 288 U. S. 178 (1932). In that case a licensee of the Federal Power Commission attempted to defeat a state excise tax by urging that it was a tax upon a federal agency. The court stated—

> "It is apparent, however, that the complainant in generating and selling power is not acting as agent for the government. It acts with the government's permission, and while it may be said to have received a privilege from the government, it is not a privilege to be exercised on behalf of the government." (p. 180)

The court in that case expressly approved the finding of a three judge court below that the purpose of the legislature was "to tax the generation of electric current by the hydro-electric companies which utilize the water power in the rivers of South Carolina, *one of the great natural resources of that State.*" (Emphasis ours) (p. 179)

Congress never intended to take rights from a state and transfer them to a private corporation. It specifically preserved the rights of the states to take over projects under license by condemnation (Section 14). This disposes of any argument that Niagara-Mohawk is a "chosen-agent" of the United States as against the State of New York.

The position which the Commission now takes is a novel one. Before the Court of Appeals, the Commission

argued as follows:

> "II. Under the laws of New York the right to use the water of the navigable Niagara River belongs to the State and is inalienable. The two claimants whose rights are asserted here were not authorized by the State during the period March 1941 through 1946 to use water taken from Petitioner's diversion canal and they do not have valid private rights under State law.
>
> "III. Valid private rights under State laws are subordinate to rights of United States or its permittees to take and use water of the navigable Niagara River for power development. The United States may under Section 14 impose the license condition required here which precludes Petitioner from claiming payments for prospective earnings from water power rights as part of operating expenses or capital cost of this licensed project." (Court of Appeals Brief, p. 4)

The Solicitor General's present position is also inconsistent with that asserted by that official in a memorandum dated September 1, 1951 submitted to the Chairman of the Senate Committee on Interior Insular Affairs, in connection with the Submerged Lands Act then under consideration by Congress. That memorandum was submitted in reply to a memorandum of the attorneys general of various states, contending that the decision of this court in *United States* v. *California,* 332 U. S. 19 (1947), had cast doubt upon the title of the states to their inland waters. He stated—

> "The truth is that not a pint of inland waters or an inch of the lands under such waters is involved or ever has been involved in the controversy over rights in the marginal sea." (U. S. Code Cong. and Adm. News, 1953, No. 9, p. 1449)

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The Congress in approving the Submerged Lands Act in effect confirmed the rights of the states in the water power of their navigable rivers. The report of the House Committee on that act, stated:—

> "This title does not affect any of the federal constitutional powers of regulation and control over these areas within state boundaries. Such powers as those over navigation, commerce, national defense, international affairs, flood control, and power production, where the United States owns or acquires the water power." (House Report No. 215, 83rd Cong. 1st Sess.; U. S. Code Cong. and Adm. News 1950, No. 9, p. 1219)

Here again Congress indicated its understanding that the water power of navigable rivers belonged to the states unless it had been acquired by the United States by construction of a federal project or otherwise.

Yet the argument of the solicitor general in this case is in many respects similar to his argument in *United States* v. *California*. The assertion of federal proprietary rights or a dominion so extensive as to destroy state proprietary rights is based upon the commerce clause instead of upon the power to conduct foreign relations, but the basic premise is the same. The difference between the two cases, as the Solicitor General has heretofore recognized, is that a long line of Supreme Court decisions have expressly stated that the states have rights both of "dominion and propriety" in their inland waters.

The debates of Congress make clear that neither the Federal Power Act nor any of the similar measures which preceded it were intended to destroy these rights, and, in fact, the debates show that Congress was so jealous of those rights that the Act would have been defeated had any other construction of it been suggested.

No doubt the preservation of local rights gives rise to inconvenience of administration and division of authority. That is a penalty of the federal system. A bicameral legislature and an executive veto also lead to division of authority, but such a division may result in sounder legislation and a sounder power program than an absolute concentration of legislative and executive power. The court should not read into the Federal Power Act sweeping purposes for the destruction of the state's interests and proprietary rights where neither the language nor history of the Act justifies such a departure from the long accepted rights of states to their inland waters.

II

Niagara Mohawk Power Corporation has no proprietary rights in the waters of the Niagara River under the law of New York.

The State of New York claims the sole proprietary rights in the flow of the waters of the Niagara River under the law of New York. We shall summarize here the legal bases of the State's claim and the principal authorities in as brief a compass as the subject permits.

A. Niagara Mohawk Power Corporation Has No Rights in the Waters of the Niagara River as a Riparian Owner

The Court below appears to base its opinion upon the view that, "this usufructuary right (to use water for power purposes) is an incident of riparian ownership and does not depend upon grant or prescription" (202 F. 2d at p. 199). This conclusion, while correct under some circumstances, is incorrect as applied to the Niagara River and to the type of diversion carried on by respondent.

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It is an elementary principle of law that the natural flow of a stream cannot be diverted by an upper riparian owner so as to deprive a lower riparian owner of the full flow of the stream. As this Court has stated:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. Sec. 439:
>
> 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate'."
> (United States v. Rio Grande Irrigation Co., 174 U. S. 690, 702 (1898))

Even if Niagara Mohawk had some riparian right to use the water of the river as it flows by the bank, it would not have the right to turn part of the flow into a new channel.

The distinction is clearly stated in *Gould on Waters* (3d ed. 1900) pages 418-419:

> "The distinction is to be observed between the right to divert or change the course of the stream itself so as to turn it away from a lower proprietor, and the

right to take water from the stream. The first is wholly unlawful; the second may be exercised to a reasonable extent."

The Court of Appeals of New York has said in *Kleinberg* v. *Ratett,* 252 N. Y. 236, 239 (1929):

> "The owner of land over or through which a natural stream flows may not divert or dam it back, to the injury of the upper or lower proprietor * * *. It is the latter's right to have the stream come down to him in undiminished flow according to established wont."

Of course, the State of New York utilizes the flow of the Niagara River for recreation purposes by the maintenance of the Niagara Reservation. However, even if the State made no use of this water, an upper riparian owner under New York law could acquire no right of diversion.

The New York law on the subject is stated in *Gray* v. *Village of Fort Plain,* 105 App. Div. 215, 217, 94 N. Y. S. 698 (3rd Dept., 1905) where the Court stated:

> "The plaintiff, as a riparian owner of lands on the stream below the point of diversion, was entitled to the full flow of all the water of the stream, even if he had never yet needed or used it."

See also *Amsterdam Knitting Co.* v. *Dean,* 13 App. Div. 42, 44, 43 N. Y. S. 29 (1897), aff'd, 142 N. Y. 633; *Smith* v. *City of Rochester,* 38 Hun 612, aff'd, 104 N. Y. 674 (1887).

B. The Niagara River is Navigable in Law. The Proprietary Rights Not Only to Its Bed But Also to the Flow of Its Waters Are in the State

The rights of the State of New York to the bed of the Niagara River have been recognized for many years. In *Matter of Commissioners of the State Reservation at*

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Niagara, 37 Hun 537, app. dism., 102 N. Y. 734 (1886), it was stated that the proprietary right from the margin of the Niagara River to the international boundary line is in the State and that the riparian owners have taken only to the waters' edge. The Court distinguished the Niagara River from other fresh water rivers which are not navigable in law, stating:

> "The rule is otherwise in respect to navigable rivers. There the property is in the Sovereign or State, and the riparian owners as against it, for its use, have no proprietary interest or right in the waters as appurtenant to the soil owned by them on the river banks." (p. 546)

Under New York law the Niagara River and the St. Lawrence, Hudson and Mohawk Rivers are placed in a special category. *People* v. *System Properties, Inc.,* 281 App. Div. 433, 120 N. Y. S. 2d 269 (3rd Dept., 1953). The beds of these rivers are not capable of private ownership. As to these streams the State has not merely a power of regulation as sovereign coordinate with that of the United States, but it also has the proprietary right to the bed and flow of the stream.

This rule was applied by the Court of Appeals to the Mohawk, one of the three other navigable-in-law rivers in New York (see *Fulton Light, Heat & Power Co.* v. *State,* 200 N. Y. 400 at 413 (1911)), in *People ex rel. Loomis* v. *Canal Appraisers,* 33 N. Y. 461, 464 (1865):

> "The title to the land or bed of the river, undeniably, carried with it the water that flowed over it."

The rule of the *Loomis* case was reaffirmed in *Danes* v. *State,* 219 N. Y. 67, 75 (1916), where Judge Collin stated:

> "This court held in a thorough and irrefragable opinion that the claim of the relator was erroneous,

and that the title to the bed of the Mohawk River and to the water flowing over it was in the people or state."

Although the Court below cites contrary language in the opinion in *People ex rel. Niagara Falls Hydraulic Power & Manufacturing Co.* v. *Smith,* 70 App. Div. 543, 75 N. Y. S. 1100 (1902), the authority of that case is questionable. The State was not a party to it. The two litigants were a predecessor of the Niagara Mohawk and the tax authorities of the City of Niagara Falls. Niagara Mohawk was in the position of disparaging its own title. The trial court appears to have erroneously assumed that the Niagara River was not a navigable stream at the place involved (70 App. Div. at 546). Since the Court of Appeals wrote no opinion, the basis of its affirmance is in doubt. In a later case dealing with these very waters, the Court of Appeals refused "because the State itself is not a party" to determine "the particular nature and extent of defendant's (*i. e.* Niagara Mohawk's) rights or privileges as acquired from the State or as riparian owner * * *." *Water Power & Control Commission* v. *Niagara Falls Power Co.,* 289 N. Y. 353 (1942).

The same is true of *Hydraulic Power Company* v. *Pettebone-Cataract Paper Company,* 198 App. Div. 644, 191 N. Y. S. 12 (1921), cited by the Court below. That was a controversy between two diverters, neither of whom would benefit by asserting that title was in the State.

C. The 1885 Condemnation Terminated Any Previously Existing Rights of Diversion

The order of the Supreme Court of New York which affirmed the report of the appraisers of the property taken by the State for the State Reservation, described the rights acquired in the following language:

"* * * all the right, title and interest of all persons or corporations of, in and to the premises embraced

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within said boundary lines, including all water rights, made-land (so called) debris, titles or claims (if any) to lands lying under the Niagara River, rights of riparian owners, easements and appurtenances of every name and nature whatsoever, including all the rights of, in and to all streets, or portions of streets, embraced and included within said boundary lines." (Report of the Commissioners of the State Reservation at Niagara, February 17, 1885, N. Y. Sen. Doc., 1885, No. 35, p. 15)

Since the area taken lay between the intake and discharge works of respondent and since respondent's diversions were not immediately terminated, respondent has argued that the State Reservation was servient land and was taken subject to its rights. These facts do not support that conclusion. The principal purpose of the acquisition was to acquire, protect and preserve the Niagara Falls. If the State took subject to servitudes of upstream riparian owners, the asset acquired would not serve the purpose for which it was to be used. The Attorney General of New York has expressly ruled that Niagara Mohawk's predecessor acquired no riparian rights as against the State (1895 Op. N. Y. Atty. Gen. 322).

D. The Statutes of New York Relied Upon by Niagara Mohawk Power Corporation Do Not Grant Perpetual Rights But Are Permits Revocable at the Will of the State

None of the New York statutes relied upon by respondent purported to grant perpetual rights nor in fact a title of any character. By their language they grant permission to the corporate recipient to construct works on lands in the Niagara River and to divert waters therefrom.

The Legislature could not have granted any title to these properties because Article III, Section 20, of the State Constitution requires the assent of two-thirds of the mem-

bers of each branch of the Legislature to appropriate public property and several of these statutes did not achieve that majority.

The basic statutes limited the corporate existence of the companies to a term of fifty years and this period has already expired. Although the corporate life of the company has been extended, that has been accomplished under a statute which specifically reserves all State rights to the bed and waters of the Niagara River.

Aside from these considerations and others which need not be mentioned here, the limited character of these grants is evident from the fact that under New York law the Legislature has no power to grant away to private parties the reserved rights of the State in these waters. In a closely analogous situation, the Legislature of the State purported to grant to a private corporation a right to dam the St. Lawrence River for water power purposes. The Attorney General of New York ruled that the statute was unconstitutional, and a subsequent Legislature repealed it. When the matter was presented to the Court of Appeals of the State of New York it sustained the Attorney General and the Legislature in *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), stating:

> "As long as the waters are maintained as navigable they remain public waters of the State; and as long as they remain public waters of the State the State is bound to retain control over them in the public interest."

More recently it was stated in *Matter of City of Syracuse* v. *Gibbs*, 283 N. Y. 275, 283 (1940):

> "It was the duty of the State to control and conserve its water resources for the benefit of all the inhabitants of the State. The public right to the benefit of such resources is an incident of sovereignty * * *.

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Whatever the City got by the statutes upon which it relies was subject to the reserved powers of the State, to control in the public interest, the use of the waters of the lake."

The Court of Appeals stated with respect to the waters involved here in *Niagara Falls Power Co.* v. *Water Power and Control Commission*, 267 N. Y. 265 (1935):

"The privileges and rights granted to the power company were taken subject to this (reserved) right of the State and also subject to the control of Congress." (p. 276)

Again it was stated in *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 57 N. Y. S. 2nd 777 (Sup. Ct., Albany, 1945):

"No one would doubt that the state could interfere with the plaintiff's riparian rights, or even destroy them in the interest of navigation in the river. And it is not very much more doubtful that if the state has the power to act in the preservation of public water in the public interest that it may do so in the direction of preserving to the people the energy of Niagara Falls by a clearly expressed statute for that purpose regardless of the rights it may have previously created, permitted or allowed in these waters. I do not think the issues presented by this case can be met on any other or narrower ground than this.

* * * * *

Niagara Falls is one of the prime natural resources of the state. It can scarcely be believed that the Legislature in granting rights to use its energy, and the company's predecessors in accepting the rights given, believed that this natural resource was being placed for all time by the crystalization of contractual

> obligations beyond the control of the people of the state. The companies and the Legislature in their arrangements were bound as reasonable men to anticipate, and I think they did anticipate, that the 'title' to the perpetual use of a natural resource of the very first magnitude might be disavowed by differently minded men in future times, by men who might feel that resources of this kind are inalienable and who would be unwilling that another generation bind them irrevocably in the use to be made of them."

See also *Coxe* v. *State,* 144 N. Y. 396 (1895); *People* v. *System Properties, Inc.,* 281 App. Div. 433, 120 N. Y. S. 2d 269 (3rd Dept., 1953).

A similar conclusion was reached by this Court in *Illinois Central Railroad Company* v. *Illinois,* 146 U. S. 387 (1892). Of course, the Federal Power Act would not prevent the State from taking over the diversion now carried on by Niagara Mohawk because that right is expressly reserved to states and municipalities in Section 14.

International Paper Co. v. *United States,* 282 U. S. 399 (1931), does not in any way limit these conclusions. The State of New York was not a party in that case and the extent of rights under state law was not material to the holding made. The statement of the Court that the Niagara Falls Power Company "was the owner so far as the law of New York could make it owner of land and water rights" involves no inconsistency because, as we have shown, all that the State of New York could grant was a temporary permit.

The fact that Niagara Mohawk Corporation pays an annual rent to the State of New York for the use of waters of the Niagara in itself establishes that the State is the owner of the right to use these waters and that no vested right as against the State has been acquired.

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Conclusion

The State submits that in the determination of this proceeding the Court should hold that Niagara Mohawk Corporation has acquired no proprietary rights in the waters of the Niagara River under the laws of the State of New York and should further hold that the proprietary rights of the State of New York in the waters of the Niagara River have not been superseded by Act of Congress.

October, 1953.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York.

Appendix

Remarks of Representative La Follette
56 Congressional Record 9109-9111

Mr. Chairman, before touching on these essential propositions I have mentioned, I desire to say that the gentleman from Oklahoma [MR. FERRIS], who filed the minority report, and the chairman of the committee [MR. SIMS] are evidently proceeding under an entirely different assumption of fact and theory for the creation of this bill and the Government's relationship to it, than does the Member who is now addressing you. They seem to approach it from the viewpoint of the Government being a supreme proprietor and we, as legislators, working out a plan whereby she can provide for development, through private individuals, of her properties. The gentleman from Oklahoma, on the last page of the reports from committee on this bill, among other things, says:

I deny that it is the correct principle for the Federal Government to first grant away the most valuable of all its resources, and then by ponderous, cumbersome, provisions make its recapture and retaking nonfeasible if not impossible.

Mr. Chairman and gentlemen, I would be the last man in this House to raise a question as to the soundness of that enunciation if I thought the gentleman had even a questionable legal right for his assumption. I know these gentlemen to be honest and earnest in their desire to safeguard from their viewpoint the people as a Federalized Government. But, Mr. Chairman, after a careful and painstaking study of the Constitution of the United States, and after reading most carefully many United States Supreme Court findings and decisions, as well as many State court decisions, I have been compelled to conclude that the Federal Government's having any proprietary rights superior to any other riparian owner, with the

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exception of freedom from taxation, in what the gentleman designates as "the most valuable of all its resources," is romance, pure and simple.

Mr. Chairman, we have here the Constitution of the United States. I am very desirous of instruction and information. I will be pleased for the gentleman from Oklahoma, or any other gentleman who shares his ideas as to the Federal Government's proprietary rights, to kindly call to my attention the particular article and section of the Constitution that confers on the Federal Government any proprietary rights in the streams, lakes, or harbors of the United States, or any amendment to the Constitution that does so. It is true that under Article IV, section 3, paragraph 2, we find the following language:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, or of any particular State.

But, Mr. Chairman, the Supreme Court, in decision after decision, has enunciated the opinion that this provision of the Constitution does not imply nor show that the Federal Government has any proprietary rights as to water, or to bed or bank, of any stream in these United States, either in navigable or nonnavigable streams. In the House Manual and Digest, under the paragraph of the Constitution which I have just read, there are some 38 United States Supreme Court citations, many of them touching on this very question of proprietary rights. In Martin *v.* Waddell (16 Pet., 410), Chief Justice Taney said in part:

When the Revolution took place the people of each State became themselves sovereign, and in that character hold absolute right to all their navigable waters and the soils under them for their common use, subject only to the right since surrendered by the Constitution to the General Government.

In the case of Pollard, lessee, v. Hagan (3 How., 229), the court, after quoting the above statement, said:

Then, to Alabama belong the navigable waters and soils under them in controversy in this case, subject to the rights surrendered by the Constitution to the United States, and no compact that might be made could diminish or enlarge these rights.

The court concludes the opinion in that case in these words:

By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Thirdly, the right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the sale and disposition thereof conferred no power to grant to the plaintiffs the land in controversy in this case.

Mr. Chairman, there are dozens of Supreme Court decisions upholding the States' sovereignty and right of control of the water, beds, and banks of navigable and nonnavigable streams, lakes, and tidal bays. The very latest Supreme Court decision on this question contains in part this language: (October term, 1916, 243 U. S., 316. Syllabus. United States *v.* Cress. United States *v.* Kelly et al. Error to the District Court of the United States for the Eastern District of Kentucky. Nos. 84, 718. Argued Dec. 13, 1916. Decided Mar. 12, 1917.)

The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and nonnavigable, and the ownership of the lands forming their beds and banks (Barney *v.* Keokuk, 94 U. S.

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324, 338; Packer *v.* Bird, 137 U. S. 661, 671; Hardin *v.* Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. *v.* St. Paul Water Commissioners, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (Shibely *v.* Bowlby, 152 U. S. 1, 40; Gibson *v.* United States, 166 U. S. 269, 272; Scott *v.* Lattig, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the fifth amendment against the taking of private property for public use without just compensation (Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; United States *v.* Lynah, 188 U. S. 445, 471).

This decision was rendered March 12, 1917, and fully sustains the States' power and sovereignty over water, bed, and banks of all character of streams.

Decisions by the hundred can be produced to sustain the contention that section 3, paragraph 2, of Article IV, of the Constitution, infers no such proprietary rights in the Federal Government. The syllabus of the case known as Kansas *v.* Colorado (206 U. S., 46-92), expresses the situation and status of the United States clearly and succinctly. It reads in part:

The Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of the powers granted is to be found in that alone; that the manifest purpose of the tenth amendment to the Constitution is to put beyond dispute the proposition that all the powers not granted are reserved to the people, and that if in the changes of the years further powers ought to be possessed by Congress they must be obtained by a new grant from the people. While Congress has general legislative jurisdiction over the Territories

and may control the flow of waters in their streams, it has no power to control a like flow within the limits of a State, except to preserve or improve the navigability of the stream; that the full control over these waters is, subject to the exception named, vested in the State.

And later on it says:

It is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

Mr. Chairman, Article I, section 8, paragraph 3, contains what is known as the commerce clause of the Federal Constitution, which reads:

[Congress shall have power] to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

It is under that provision that we concede the Government's power and right to maintain jurisdiction over navigable waters of the United States for the purposes of navigation and the improvement thereof; and that clause confers no property rights whatever upon the United States, nor does it confer any supervisory right upon the United States for any other purpose than that of navigation, a contention, Mr. Chairman, that has been decided affirmatively for so long a period that it is needless to enlarge on it. The United States is simply the trustee of the States, to preserve and see that the general navigation rights of all are equally protected, and, when necessary, improved to insure the usableness of those avenues of commerce and trade "with foreign nations, between the States, and with the Indian tribes." This and nothing more.

This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment.

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We have for many years been trying to develop more or less power from rushing or falling water in many States of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

It is true that some of the States have granted such rights, and dams have been built, and their legality upheld by the courts, and there have been many interesting questions raised and decisions rendered; but time forbids my going into that phase of this question.

Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority but little development has been made. Under pressure for something to be done to make development possible the Interior Department, without any legal status other than the act of February 15, 1901, United States Statutes, chapter 372, "relating to rights of way through certain parks, reservations, and other public lands," put into effect a system of revocable permits where such lands were involved. The gentleman from Oklahoma, in his minority report, refers to our operating under that system. It would have been interesting had he seen fit to put in a table showing how many such permits have been granted, how many so-called horsepower have been developed under that system, and how many millions of dollars have been in-

vested subject to the revocation at will by some political appointee. He did not do so, and I think he himself would have been surprised had he made an investigation. For all practical purposes there has been no development whatever under that system; any plants built under such a system necessarily being restricted to those whose projectors had their own capital or could give other security than the plant if they borrowed money for the enterprise. The law referred to as appertaining to navigable streams also hampers, but would not deter capital as does the one where the lands above the bank are public domain. Court decisions can be found justifying the belief that the Government would not be allowed to revoke licenses at will, but only where navigation needs were imperative making the destruction of the plant a necessity—a remote possibility. The builders would naturally build in such a way as to make that risk a negligible quantity. However, there has been little development under that provision of law. Capital demands and will have certainty of tenure and definite assurances as to its human liabilities. To expect anything else is unwarranted and not justified by commercial principles and practices of the decades and centuries gone by.

This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. Our not having greater development is inexcusable on any other ground than lack of grasp of the situation and inability to cope with it. This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict

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navigation, but rather to benefit it. The commission is composed of the Secretary of War, who has supervisory control over all navigable streams for the purposes of navigation alone; the Secretary of the Interior, who has control of the public domain and of the power sites on such domain; and the Secretary of Agriculture, who has administrative control of all power sites in forest reserves. The three working together can harmonize all questions involving Federal interests, and under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue.

I think legislation of this character is wise and worthy of fair trial in view of the fact that under present conditions no development is possible. I think the legislation will prove to be sound in principle and sane in provisions as it comes from the committee, and, what is of transcendent importance, it will, with possibly one or two changes, stand the test as to constitutionality. Unless it will pass that test, to pass it would be futile.

Is the passing of this kind of legislation good public policy? I think it is. There has been a widespread demand for State and National supervision over all natural and national resources. The Government is attempting to apply that principle to the resources of various kinds on and in the public domain. Various bills have been introduced, some of which have passed either the House or the

Senate, and in one case—Alaska coal lands— both, for the leasing of oil deposits, coal deposits, phosphates, and sodium, and so forth. By the enactment of this bill we shall be able to develop our water powers, recognizing the States' rights as to water, bed, and bank control. Their public-utilities commissions will control the matter of rates charged for service, and the plants will be entirely subject to State laws as to taxation, and so forth.

Under this bill the State abrogates none of its powers or rights. Section 9 distinctly provides that satisfactory evidence must be given that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act.

Mr. Chairman, I propose at the proper time to offer to amend this paragraph, page 35, in line 4, after the word "to," by adding the words "bed and banks and," so it will read:

Satisfactory evidence that the applicant has complied with the law of the State or States within which the proposed project is to be located with respect to bed and banks and the appropriation, diversion, and use of water for power purposes—

And so forth.

If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue.

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Mr. Chairman, it might be better, as some men seem to think, if all jurisdiction as to water, bed, and banks of streams was in the Federal Government instead of in the States. If it were so there would be no complication caused by a conflicting authority. We, however, have to legislate under conditions as we find them.

OCT 23 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

MEMORANDUM FOR RESPONDENT REGARDING BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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MEMORANDUM FOR RESPONDENT REGARDING BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

The *amicus* brief is no more than an unwarranted last-minute intrusion of an issue not present in the case. None of the questions presented, as stated in the record or in the briefs of the parties, concerns the issue apparently sought to be injected by the State's brief; for nowhere is any issue framed regarding the validity of Respondent's rights *vis-a-vis* the State of New York. The fundamental issue presented is the effect of the Federal Power Act—regulation or evaporation—on those rights.

It would be perilous for this Court to attempt to decide, on the present record, the questions sought to be raised by the *amicus* brief. Indeed, it is not clear precisely what that brief seeks: The State asserts that it "takes no position" in the controversy at bar; states that although it is not a party to this proceeding and would not

be bound by it, nevertheless the State desires to call the Court's attention to the questions raised in its brief; and prays for a specific adjudication of the State's claim (Br. 2, 4, 51). Is this Court to enter upon an inquiry of questions not before it simply for the purpose of gratuitously advising New York on a matter which New York itself acknowledges will in no way bind it?

This memorandum will not argue the merits of the issues raised in the State's brief. But because of the public interest assertedly surrounding the questions raised in that brief, particularly in view of the pending controversy over the development of additional power at Niagara Falls, we note our disagreement with various points raised in the State's brief. We wish to make clear that we will vigorously contest an attack by the State on these rights if it is ever properly made in an appropriate forum. At this time, however, we are unwilling to let pass *sub silentio* various erroneous statements in the State's brief.

We observe that the State's assertions have a familiar odor; most if not all have been put forward by the State Water Power and Control Commission in prior litigation regarding diversions from the Niagara River discussed in our main brief (pp. 60-63). Presumably the State is moved to resurrect these claims because of the current dispute as to who shall develop additional power at Niagara Falls; but that seems hardly a justifiable reason for injecting these time-worn claims into the present litigation.

We note at the outset that the bulk of the State's brief is in agreement with the fundamental proposition argued in our main brief—that the Federal Power Act has not destroyed proprietary rights to the use of waters from navigable streams (Br. 21-42).

But the remainder of the State's brief, arguing that the State and not Respondent has the sole proprietary interest

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in the waters of the Niagara River, raises a number of points with which we are in sharp disagreement:

1. We challenge the assertion that Respondent has no rights of diversion as riparian owner because the State, as a lower riparian owner, is assertedly entitled to the full flow of the stream (Br. 42-44). The fact is that the State's lower riparian rights were acquired after the common owners of the lands bordering the hydraulic canal and of the lands later included in the State Reservation had agreed to the diversions through the canal to the land below the Falls, thus bypassing the intervening lands which later became the State Reservation.[1] Can it be said that a lower riparian owner, who acquires his land with knowledge of diversions by an upstream owner—made under grant from and agreement with his own predecessors in title—may nevertheless insist upon the full flow of the stream free and clear of such diversions? We say not; *volenti non fit injuria.* Indeed, in prior litigation between Respondent and the State Water Power and Control Commission, the court stated that by the 1892 and 1896 statutes (N.Y.L. 1892, c. 513, R. 403; L. 1896, c. 968, R. 405) the State as a lower riparian owner consented to the diversion of waters by Respondent's predecessors around the State Reservation. *Water Power and Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div. 460, 463 (1941), *aff'd*, 289 N. Y. 353 (1942).

2. We challenge the statement that riparian owners in New York have no proprietary interest

[1] See *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 698-701 (1945) summarizing the history of diversions from the Niagara River.

or right in the use of water as appurtenant to the soil owned by them on the banks of navigable rivers (Br. 45). This broad language regarding riparian rights, quoted from an 1885 decision, is totally at variance with and must be regarded as overruled by later New York decisions cited in our main brief. *United P. B. Company* v. *Iroquois P. & P. Company*, 226 N. Y. 38, 46 (1919); *Waterford Electric Light, Heat and Power Company* v. *The State of New York*, 208 App. Div. 273, 283 (1924), *aff'd without opinion*, 239 N. Y. 629 (1925). And with respect to the very diversions at bar, it has been acknowledged that "there can be no doubt of the right of riparian owners to use this [Niagara River] water", subject of course to the "sovereign's judgment of necessity." *Niagara Falls Power Co.* v. *Burgea*, 185 Misc. at 704 (1945).

Moreover, as pointed out in our main brief (pp. 15-18) this Court and the courts of New York have expressly recognized the validity of the rights at bar. *International Paper Company* v. *United States*, 282 U. S. 399 (1931); *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company* v. *Smith*, 70 App. Div. 543 (1902), *aff'd without opinion*, 175 N. Y. 469 (1903); *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.*, 198 App. Div. 644, 646 (1921). The State now attempts to distinguish these cases on the ground that the State was not a party thereto (Br. 46, 50); but the tenuous character of this distinction becomes apparent when it is realized that in *Smith* the controversy was with the taxing authorities of the City of Niagara Falls.

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3. We challenge the claim that an 1885 condemnation by the State, of downstream land for the State Reservation, terminated Respondent's rights of diversion (Br. 46-47). As the State well knows, the fact is that Respondent's predecessor, the then proprietor of the canal, was not a party to the condemnation proceeding and no part of its land used for canal purposes was taken. The rights acquired by the State at that time were expressly limited to premises "within said boundary lines, including all water rights, * * * embraced and included within said boundary lines"; this much is clear from the quotation in the State's brief at pp. 46-47. Can it be seriously asserted that by condemning a specific parcel of riparian land the State has generally appropriated all waters of the Niagara River?

The 1895 opinion of the Attorney General of New York (Br. 8, 47) adds nothing, for a year later the State Legislature passed a statute which "recognized, declared and confirmed" the riparian rights of Respondent's predecessor to take and use waters of the Niagara River and to develop power therefrom (N.Y.L. 1896, c. 968, R. 405).

4. We challenge the contention that the 1896 statute, and other enactments of the New York Legislature, constitute mere permits revocable at will (Br. 47-50). But admitting solely *arguendo* that water rights granted by the State may be revocable in character, the fact remains that no such revocation has here been undertaken by the State—particularly none before or during the period from March 1941 to December 1946 with which the present controversy is concerned.

The State's principal reliance here appears to be *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), *error dismissed*, 242 U. S. 272 (1916), which is fully dealt with in our main brief at p. 58. The State also apparently seeks comfort from selected extracts of *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945). *Duryea* is fully discussed in our main brief at pp. 60-63; the fundamental and indisputable fact is that *Duryea* in no way holds that Respondent's water rights have been abolished.

5. We challenge the assertion that 1931 and 1951 State statutes (N.Y.L. 1931, c. 772, §1; L. 1951, c. 146, §1) abolished Respondent's water rights (Br. 3-4). The State makes no attempt to elaborate this claim. It is sufficient for present purposes to observe that both those statutes relate by their express terms to beds and waters and power sites "owned or controlled" by the State—not to existing privately-owned water rights and power sites.

6. We challenge the notion that the State asserted its title to Respondent's water rights by collecting a rental for the use thereof (Br. 2, 20). The history of *Duryea*, outlined in our main brief at pages 60-63, answers this contention.

In closing, we point out that Respondent has never been required to obtain a license from the State Water Power and Control Commission; that its diversions from the Niagara River have never been interfered with and have continued to date; and that relying upon its vested rights to divert waters from the Niagara, Respondent has laid out many millions of dollars in the development of hydro-electric plants using those rights. The present contro-

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versy involves only the period from March 1941 through December 1946; at no time during the extensive proceedings before the Federal Power Commission did the State assert the claims it seeks to raise at this eleventh hour before this Court. Indeed, it baldly asserts that it has no interest in the matter with which the Commission was then dealing. Yet with no record support whatever, it now asks this Court to take cognizance of its wholly extraneous contentions.

Respectfully submitted,

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October, 1953.

SUPREME COURT OF THE UNITED STATES

No. 28.—October Term, 1953.

Federal Power Commission, Petitioner, *v.* Niagara Mohawk Power Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 15, 1954.]

Mr. Justice Burton delivered the opinion of the Court.

The most significant issue raised by this case is whether the Federal Water Power Act of 1920 [1] has abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. We agree with the Court of Appeals that it has not. We agree also that in computing a federal licensee's amortization reserve, required by § 10 (d) of that Act, as amended,[2] the Federal Power Commission was not justified in dis-

[1] The Federal Water Power Act of 1920, 41 Stat. 1063, as amended, is now Part I of the Federal Power Act, 49 Stat. 838, 16 U. S. C. §§ 791a–825r.

[2] "Sec. 10. All licenses issued under this Part shall be on the following conditions:

. . . . . .

"(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. . . ." 49 Stat. 842, 843, 16 U. S. C. § 803 (d).

allowing the expenses paid or incurred by the licensee in this case for the use of such rights.

March 2, 1921, Niagara Falls Power Company, a New York corporation, predecessor in interest of Niagara Mohawk Power Corporation, a New York corporation, respondent herein, secured from the Federal Power Commission the federal license with which we are concerned. It was the first such license issued under the Federal Water Power Act of 1920. Its term was 50 years. It authorized the diversion of water for power purposes from the Niagara River, above the Falls, and the return of it below the Falls, all in New York. The daily diversion, in the aggregate, could not exceed 19,500 cubic feet per second (c. f. s.).[3]

Section 10 (d) of the Act requires each licensee, after 20 years of operation under such a license, to establish and maintain amortization reserves out of any surplus thereafter earned and accumulated in excess of a reasonable return upon the licensee's net investment. Section 14 makes such net investment, plus severance damages, a principal measure of the price the Government is to pay when and if it takes over all or part of the property.[4]

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[3] This limit soon was increased to 19,725 c. f. s., 6 F. P. C. 184, 185, and later to 20,000 c. f. s., see 9 F. P. C. 228, 244, n. 28. The Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada, proclaimed, May 13, 1910, limited the diversion from the United States side to 20,000 and on the Canadian side to 36,000 c. f. s. 36 Stat. 2448, 2450. As to additional emergency and temporary diversions, see 55 Stat. 1276, 1380; 1 U. S. Treaties and Other International Agreements 694.

[4] 49 Stat. 844–845, 16 U. S. C. § 807. See also, § 16 as to compensation to be paid for temporary use of the property by the Government, 41 Stat. 1072, 16 U. S. C. § 809; § 20 as to rate fixing, 41 Stat. 1073–1074, 16 U. S. C. § 813; and § 26 as to a purchase by the Government at a judicial sale, 41 Stat. 1076, 16 U. S. C. § 820. "Net investment" is defined in § 3 as follows:

"(13) 'net investment' in a project means the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914,

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In 1942, the Commission expressly held that § 14 applied to this licensee.[5]

In 1947, Article 11 of the license was amended so as to specify a 6% rate of return and to require 50% of the licensee's surplus earnings to be paid into its amortization reserves. As so amended, the article read:

> "After the first twenty (20) years of operation of the project under this license, namely after March 1, 1941, six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings in accordance with the provisions of Section 10 (d) of the Act for the establishment and maintenance of amortization re-

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Interstate Commerce Commission,' plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. . . ." 49 Stat. 839, 16 U. S. C. § 796 (13).

In the instant case the Commission explains that—

"Section 10 (d) is part of a larger pattern of fairness set up by the act to induce water-power development. Licensees are assured a 'fair return,' but the public is safeguarded against profiteering by a licensee through profits beyond a fair return. At the end of the license period and upon 'recapture' by the Federal Government, earnings throughout the license period are to be tested against a fair return standard set up in section 3 (13)." 9 F. P. C., at 248.

[5] This resulted from the decision that the "fair value" provisions of § 23 (a), 49 Stat. 846, 16 U. S. C. § 816, applied to licenses to use water rights previously held under permits from the Federal Government, whereas this licensee's prior water rights, if any, arise under the law of New York. *In re Niagara Falls Power Co.*, 3 F. P. C. 206, aff'd by the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787.

serves to be held until termination of the license, or in the discretion of the Commission, to be applied from time to time in reduction of the net investment in the project, and one-half of all surplus earnings in excess of six (6) per cent per annum received in any calendar year shall be paid into and held in such amortization reserves." [6]

In 1948, the Commission began this proceeding to determine the licensee's amortization reserve liability. It was the Commission's first such effort under § 10 (d). In 1949, pursuant to a revised staff report, the Commission directed the holder of this license to show cause why one-half of its surplus earnings from March 2, 1941, through December 31, 1946, in the amount of $994,521.33, should not be set aside in an amortization reserve, and why a like proportion of its subsequent surplus earnings should not be set aside annually upon a comparable basis. In 1950, the Commission's presiding examiner recommended that the licensee's initial reserve be $914,432.04, and the Commission approved that figure in preference to $515,432.04 proposed by the licensee. One Commissioner filed a con-

[6] A proceeding seeking the Commission's approval of a further amendment to Article 11 was consolidated with the show-cause proceedings in the instant case. In response, the Commission, in 1950, ordered that article amended to read:

"After the first 20 years of operation of the project under this license, 6 percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves, pursuant to section 10 (d) of the act; one-half of all earnings in excess of 6 percent per annum shall be paid into such amortization reserves and such amortization reserves shall be established, maintained and disposed of in accordance with the terms of the act and such rules, regulations and orders of the Commission as may be adopted pursuant thereto." 9 F. P. C., at 259.

Under the above amendment, the method of setting aside the amortization reserves may be prescribed by the Commission. 9 F. P. C., at 232–233, 239.

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curring statement and one dissented. 9 F. P. C. 228. However, the Court of Appeals for the District of Columbia Circuit, one judge dissenting, upheld the licensee and remanded the case to the Commission with instructions to modify its order accordingly. 202 F. 2d 190.[7] The decision turned primarily upon the court's conclusion that neither the Federal Water Power Act nor the issuance of a license thereunder had abolished the licensee's private proprietary rights to use the waters of Niagara River for power purposes. That issue was inescapable because the Commission, in computing the licensee's required amortization reserve, had found that certain annual payments and discounts made by the licensee for its use of private water rights, existing under state law, along the Niagara River, were not allowable expenses for the reason that the Commission considered those rights no longer existent. The Court of Appeals held precisely the contrary and we granted certiorari because of the important bearing of the decision upon the Federal Water Power Act. 345 U. S. 955.

The immediate issue thus presented is whether the licensee's amortization reserve under § 10 (d), for the period from March 2, 1941, through December 31, 1946, should be $914,432.04 or $515,432.04.[8] That difference of $399,000 is one-half of the $798,000 which the Commission believes should be included in the surplus earnings of the licensee for the period. It consists of—

> 1. $577,500 paid by the licensee, at the rate of $99,000 a year, for its use, for power purposes, of 730 c. f. s. of the "International Paper water rights," and

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[7] *Per curiam.* Kimbrough Stone, Circuit Judge, retired, from the Eighth Circuit, sitting by designation; Wilbur K. Miller, Circuit Judge. Dissenting, Bazelon, Circuit Judge.

[8] For computations, see Appendix, *infra*, p. 18.

2. $220,500 allowed by the licensee as a discount at the rate of $37,800 a year, on certain sales of electric power in consideration of permission to use, for power purposes, 262.6 c. f. s. of the "Pettebone-Cataract water rights."

The Court of Appeals held that although respondent's predecessor, in 1921, had received a federal license for this project, it nevertheless was justified in continuing to meet the financial obligations which it had assumed in return for permission to use water rights originally granted and still existing under the law of New York. That court, accordingly, approved each of the foregoing items of expense and fixed the licensee's initial amortization reserve at $515,432.04.

It was not questioned in the Court of Appeals or here that the licensee originally had acquired, in return for the above-stated payments and discounts, some kind or degree of private proprietary rights under the law of New York to use water from the Niagara River for power purposes. Accordingly, we do not consider it necessary to review here the intricate transactions which resulted in the above-described payments and discounts. We accept the conclusion of the Court of Appeals "that the International Paper and Pettebone-Cataract water rights are valid under the law of New York." 202 F. 2d, at 202.[9] For further recognition of these water rights under state law, see *Water Power & Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div.

[9] Respondent's corporate history and the devolution of the title to the International Paper and the Pettebone-Cataract water rights are described by the Court of Appeals in 202 F. 2d 191, at 194–197, 198–202. See also, *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787. For a detailed examination of the facts and issues of the instant case, see Schwartz, Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?, 102 U. of Pa. L. Rev. 31.

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460, 30 N. Y. S. 2d 371, aff'd, 289 N. Y. 353, 45 N. E. 2d 907; *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 57 N. Y. S. 2d 777.

Neither is it necessary for us to discuss the licensee's expenses in 1947 or thereafter. They must be treated in the same way as those above mentioned, except to note that the discounts allowed in return for the Pettebone-Cataract water rights ceased with the licensee's purchase of those rights in 1947. See 202 F. 2d, at 196.

We are not required to determine the nature of the rights claimed by respondent except to recognize that they are usufructuary rights to use the water for the generation of power, as distinguished from claims to the legal ownership of the running water itself. They are rights to use the force of the fall of the water, coupled with an obligation to return the water to the river under specified conditions.[10] The rights under consideration originally were attached to riparian lands above and below the Falls. However, they long have been separated from such lands and, thus separated, they have been transferred or leased to respondent. Under the law of New York, they constitute a form of real estate known as corporeal hereditaments.[11] The Commission does not now contest the pur-

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[10] ". . . While the right to its use, as it flows along in a body, may become a property right, yet the water itself, the *corpus* of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use." *Sweet* v. *Syracuse*, 129 N. Y. 316, 335, 27 N. E. 1081, 1084.

[11] A riparian owner in New York has a right to use the waters of an abutting stream as part of his estate. *United Paper Board Co.* v. *Iroquois Pulp & Paper Co.*, 226 N. Y. 38, 123 N. E. 200;

chase prices which have been paid for any of these rights. The Commission's present objection is limited to respondent's deduction, in the computation of its amortization reserves, of the annual payments and discounts it has made and which it proposes to make for the use of such rights. The Commission contends (1) that Congress not only may constitutionally abolish such local water rights without compensation but that it already has done so, and (2) that, although the licensee's contested expenditures may be lawful, or even obligatory, between the parties, they must be disallowed in computing the licensee's amortization reserve under § 10 (d).

We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude,

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Waterford Electric Light Co. v. *New York*, 208 App. Div. 273, 203 N. Y. S. 858, aff'd, 239 N. Y. 629, 147 N. E. 225.

Recovery by the International Paper Company for the deprivation of its use of the instant water rights in 1917 was authorized by this Court in 1931. Referring to the 730 c. f. s. now before us, Mr. Justice Holmes said for the Court: "From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate." *International Paper Co.* v. *United States*, 282 U. S. 399, 405. The Government was obliged to pay for taking those diversionary rights by condemnation and they are the ones for which respondent is now paying an annual rental of $99,000. The deprivation, therefore, was not an exercise of the Government's dominant servitude, but was a compensible taking by condemnation of the paper company's recognized right to use the water. "[T]he Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal." *Id.*, at 408. See also, *Van Etten* v. *City of New York*, 226 N. Y. 483, 124 N. E. 201, and *People ex rel. Niagara Falls Hydraulic Power Co.* v. *Smith*, 70 App. Div. 543, 546; 75 N. Y. S. 1100, 1101, aff'd without opinion, 175 N. Y. 469, 67 N. E. 1088.

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the Government has not exercised its power to abolish them.[12]

While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United

[12] The existence of the Pettebone-Cataract water rights, under the law of New York prior to the Federal Water Power Act, is recognized by the courts of that state. *Hydraulic Power Co.* v. *Pettibone Cataract Paper Co.*, 112 Misc. 528, 183 N. Y. Supp. 373, aff'd, 198 App. Div. 644, 191 N. Y. Supp. 12.

Furthermore, Article 13 of the license recognizes at least the possibility of the survival of these rights after the issuance of the license. It provides that in the event the United States or a new licensee shall take over the project "Such taking over of the project shall also be subject *to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic Canal or Basin of Licensee, and* to the rights, if any, of International Paper Company." 6 F. P. C. 184, 185.

In 1947, the licensee secured the approval of the New York Public Service Commission, and of the Securities & Exchange Commission (under § 12 (d) of the Public Utility Holding Company Act of 1935, 49 Stat. 824, 15 U. S. C. § 79*l* (d)) of its purchase of the Pettebone-Cataract rights from the licensee's parent corporation for $728,415.48. Having thus completed their purchase, the licensee petitioned the Commission to amend Article 13 by striking from it the above italicized reference to these rights. The Commission declined and, accordingly, the original reference to the Pettebone-Cataract rights, as well as that to the rights of the International Paper Company, remains in the license.

The Commission's denial of the requested amendment was on the ground that its consent to the omission of the original equivocal reference to the rights "might be construed as recognizing other alleged water rights claimed by another company." 6 F. P. C., at 188. The Commission took the position that the rights in question had no existence after the enactment of the Federal Water Power Act and it now regards itself as controlled by that reasoning. 9 F. P. C., at 252, 258–259. Its action, however, was not considered by the Court of Appeals to be dispositive of the issue and it is not binding upon us.

States and all rights to use the waters of those streams,[13] we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization. A classic example of such a clear authorization appears in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. It did so in explicit terms. It said:

> "SEC. 11. . . . "the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.
>
> "The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all of said lands and property of every kind and description, in fee simple absolute. . . .
>
> . . . . .
>
> "Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company . . . shall cease and determine and become null and void on January first, nineteen hundred and eleven . . . ." 35 Stat. 820, 821.

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[13] *United States* v. *Willow River Power Co.*, 324 U. S. 499; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. See also, *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799.

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In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court accordingly recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.[14]

That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties.[15]

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[14] It was in this connection that the Court pointed out the inconceivability of private *ownership in the running water* of navigable streams as distinguished from private proprietary *rights to the use of such water* for power and other purposes. *United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 69–70.

[15] *Chapman* v. *Federal Power Commission*, 345 U. S. 153, 167–168; *First Iowa Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 180–181. The Act was dedicated to "encouraging private enterprise and the investment of private capital" in power projects on a basis consistent with the public interest. H. R. Rep. No. 61, 66th Cong., 1st Sess. 3. The bill was to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same

The Act—

> "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. . . .
>
> "The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce . . . ." *First Iowa Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 171.

The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.[16]

The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise.[17]

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time protect and preserve every legitimate public interest." Statement of David F. Houston, Secretary of Agriculture. *Id.*, at 5.

[16] Section 14 even provides: "nor shall the values allowed for *water rights*, rights-of-way, lands, or interest in lands [used in computing a licensee's net investment] be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: . . . ." (Emphasis supplied.) 49 Stat. 844–845, 16 U. S. C. § 807.

[17] In § 3 (11) "project" is said to include "all water-rights . . . necessary or appropriate in the maintenance and operation of the unit, 49 Stat. 838, 839; § 4 (b) empowers the Commission, in determining the original cost of a project and the net investment in it, to require licensees to show "the price paid for water rights" as well as for lands, 49 Stat. 839; § 9 (b) requires an applicant for a license to submit evidence of whatever compliance he has made with the requirements of state law with respect to "the appropriation, diversion, and use of water for power purposes," 41 Stat. 1068; § 14 requires, when taking over a licensed project, that the "values allowed for water

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Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

The legislative history of the Act discloses no substantial support for the drastic policy which the Commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way. Representative William L. La Follette, of Washington, a member of the House Special Committee on Water Power which reported substantially the same bill as that which in 1920 became the Federal Water Power Act, said of it in 1918:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as

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rights" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee" (Commissioner Smith emphasized the significance of this clause, 9 F. P. C., at 261), 49 Stat. 844–845; § 23 (b) recognizes the application of state laws to projects where interstate or foreign commerce, public lands and reservations are not affected, 49 Stat. 846; § 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein," 41 Stat. 1077. See 16 U. S. C. §§ 796–821.

> not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it. . . . Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue." 56 Cong. Rec. 9110.

Shortly thereafter he added:

> "If we put in this language [of § 9 (b)], which is practically taken from that Supreme Court decision [*United States* v. *Cress*, 243 U. S. 316], as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property . . . . We are earnestly trying not to infringe the rights of the States." *Id.*, at 9810.[18]

In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal

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[18] In 1917, the Senate Committee on Commerce said: "[T]he bill is so framed as to protect and maintain the constitutional power and control of the Federal Government over navigable streams, as well as the sovereignty of the States and the rights of riparian proprietors over and in the beds and waters of those streams, and allow the full exercise and enjoyment of the latter, subject to the paramount authority of Congress to regulate the same for navigation purposes." S. Rep. No. 179, 65th Cong., 2d Sess. 4, as to S. 1419.

For a history of the congressional debates and hearings, see Kerwin, Federal Water-Power Legislation (1926).

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Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner's right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complainant's private proprietary water rights, existing under New York law, to use navigable waters for power purposes.[19]

> "[E]ven though the rights which the respondents [the riparian owners] here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation." *Id.*, at 377.

After quoting from §§ 10 (c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee's acceptance of the conditions of the Act), the Court added:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the im-

[19] The Court refrained from determining whether § 21 of the Act, as to eminent domain, gave the licensee a further right to condemn and thus pay for the preexisting rights. *Id.*, at 379.

pairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by § 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner [the licensee], by acceptance of the license under the provisions of § 6, must be deemed to have agreed to recognize and protect." *Id.*, at 378–379.

Parallel reasoning has been applied in a case involving a conflict between a licensee and the holder of state-recognized rights to use water from a navigable stream for irrigation purposes. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 734. See also, as to state-created water rights for power purposes, *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 372; *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F. 2d 902; *United States* v. *Central Stockholders' Corp.*, 52 F. 2d 322; *Rank* v. *Krug*, 90 F. Supp. 773, 793; *Great Northern R. Co.* v. *Washington Electric Co.*, 197 Wash. 627, 86 P. 2d 208.

In *First Iowa Cooperative* v. *Federal Power Commission*, 328 U. S. 152, at 175–176, § 27 of the Act was discussed in relation to conditions controlling the approval of projects. The language there used is applicable to proprietary water rights for power purposes as well as those for other proprietary uses. To any extent that statements in *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, cited in the *First Iowa* case, indicate a different interpretation, they are not controlling.

Respondent's private property rights are rooted in state law, subject to the paramount rights of the State and Nation. In the instant case, both the State and the Nation have made limited assertions of their superior

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rights. New York has done so through its rental charges and the Nation through its license. Neither, however, has laid claim to such an exclusive right to the waters as eliminates the limited use which respondent here seeks to make of them.

The findings of the Commission and the action of the Court of Appeals disclose no sufficient additional circumstances demonstrating the unreasonableness of the expenses in question.[20]

The judgment of the Court of Appeals, accordingly, is

Affirmed.

MR. JUSTICE REED withdrew from the consideration and decision of this case.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[20] Claims of the State of New York, in its own favor, suggested in its brief or oral argument as *amicus curiae*, are not before us.

Appendix.—The Commission's computation, 9 F. P. C., at 258, is reached as follows:

"Period	Base	Earnings	Specified return (6 percent)	Surplus earnings	Amortization reserve credits
Mar. 2, 1941 to Dec. 31, 1941	$36, 101, 556. 74	$2, 480, 131. 61	$1, 805, 077. 84	$675, 053. 77	$337, 526. 88
Year 1942	35, 817, 450. 85	2, 600, 032. 64	2, 149, 047. 05	450, 985. 59	225, 492. 80
Year 1943	35, 464, 320. 95	2, 298, 684. 44	2, 127, 859. 26	170, 825. 18	85, 412. 59
Year 1944	34, 925, 610. 46	1, 952, 641. 25	2, 095, 536. 63	(142, 895. 38)	
Year 1945	34, 076, 789. 61	2, 027, 324. 21	2, 044, 607. 38	(17, 283. 17)	
Year 1946	33, 286, 819. 28	2, 689, 387. 25	1, 997, 209. 16	692, 178. 09	265, 999. 77
Mar. 2, 1941 to Dec. 31, 1946		14, 048, 201. 40	12, 219, 337. 32	1, 828, 864. 08	914, 432. 04"

The above computation offsets the deficits of 1944 and 1945 against the surplus earnings of 1946 and reduces the total amortization reserve from the $994,521.33, recommended in the revised staff report, to the $914,432.04 approved by the presiding examiner and Commission. See *id.*, at 248–250.

Respondent's computation, approved by the Court of Appeals, is reached as follows:

"Period	Base	Earnings	Specified Return (6%)	Surplus Earnings	Amortization Reserve Credits
Mar. 2, 1941 to Dec. 31, 1941	$36, 101, 556. 74	$2, 366, 131. 61	$1, 805, 077. 84	$561, 053. 77	$280, 526. 89
Year 1942	35, 817, 450. 85	2, 463, 232. 64	2, 149, 047. 05	314, 185. 59	157, 092. 79
Year 1943	35, 464, 320. 95	2, 161, 884. 44	2, 127, 859. 26	34, 025. 18	17, 012. 59
Year 1944	34, 925, 610. 46	1, 815, 841. 25	2, 095, 536. 63	(279, 695. 38)	
Year 1945	34, 076, 789. 61	1, 890, 524. 21	2, 044, 607. 38	(154, 083. 17)	
Year 1946	33, 286, 819. 28	2, 552, 587. 25	1, 997, 209. 16	555, 378. 09	60, 799. 77
Mar. 2, 1941 to Dec. 31, 1946		$13, 250, 201. 40	$12, 219, 337. 32	$1, 030, 864. 08	$515, 432. 04"

This reduces the earnings by deducting from them the payments and discounts here in controversy. See 202 F. 2d, at 193.

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SUPREME COURT OF THE UNITED STATES

No. 28.—October Term, 1953.

Federal Power Commission, Petitioner, *v.* Niagara Mohawk Power Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 15, 1954.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Minton concur, dissenting.

Section 10 (d) of the Federal Power Act, 41 Stat. 1069, as amended, 16 U. S. C. § 803 (d), requires licensees to set up amortization reserves out of their surplus earnings. The Commission enforced this requirement by ordering Niagara to make a book transfer of surplus earnings to an amortization reserve account. In determining the amount of earnings available for amortization the Commission refused to allow certain water-right payments as expenses. The only question before the Court is whether the Commission could lawfully disregard these expenses in computing Niagara's earnings for § 10 (d) purposes.

The amortization reserve required by § 10 (d) serves the function of reducing Niagara's net investment. § 3 (13). Niagara's net investment is the measure of the amount the United States must pay if it decides to recapture Niagara's plant under § 14 of the Act.[1] By allowing these water-right payments as expenses for this purpose the Court increases the ultimate obligation of the United States.

It may be that Niagara is under a legal duty to pay for its water rights under state law. And I agree that the

[1] The same is true in case the United States moves to acquire the properties under § 26 by judicial sale.

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Federal Power Act was not intended to interfere with water rights created by state law. But it is not true that the United States can be made to pay, directly or indirectly, for the use of the waters of a navigable stream. That has been settled at least since *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.[2] "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.*, p. 69. If Niagara must pay for its water rights without being reimbursed by the United States, that is the price Niagara must pay for its federal license. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377; cf. *Regents* v. *Carroll*, 338 U. S. 586. The Federal Power Act should not be construed as requiring the United States to pay for something it already owns.[3] But that is precisely what the Court does today.

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[2] See also *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Commodore Park*, 324 U. S. 386; *United States* v. *Willow River Co.*, 324 U. S. 499.

[3] The command of § 14 is otherwise. It excludes from the "net investment," which must be paid if the federal government decides to recapture the project, "the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act."

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